92-357

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Apellants,

v.

WILLIAM BARR, et al.,

Appellees.

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I.

DID THE NORTH CAROLINA LEGISLATURE VIOLATE ARTICLE I SECTION 2 AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY CREATING TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR THE PURPOSE OF ASSURING THE ELECTION OF MINORITY PERSONS FROM THESE DISTRICTS TO THE UNITED STATES HOUSE OF REPRESENTATIVES?

II.

DID THE COURT BELOW ERR IN HOLDING THAT UNITED JEWISH ORGANIZATIONS, INC. V. CAREY, 430 U.S. 144 (1977) AUTHORIZED THE NORTH CAROLINA LEGISLATURE TO CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR A RACIALLY CONSCIOUS PURPOSE?

III.

DID THE NORTH CAROLINA STATE LEGISLATURE HAVE A RACIALLY DISCRIMINATORY OR INVIDIOUS PURPOSE WHEN IT CREATED TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS AT THE INSISTENCE OF THE FEDERAL DEFENDANTS?

IV.

DID THE ATTORNEY GENERAL MISINTERPRET AND MISAPPLY THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, IN REQUIRING THAT NORTH CAROLINA CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS?

V.

DO WHITE VOTERS HAVE STANDING TO SEEK RELIEF FROM CONGRESSIONAL REDISTRICTING WHICH WAS INTENDED BY BOTH THE STATE AND FEDERAL DEFENDANTS TO RESULT IN THE ELECTION OF MINORITY PERSONS TO CONGRESS FROM TWO MAJORITY-MINORITY DISTRICTS?

VI.

WERE THE APPELLANTS ENTITLED TO SUE THE FEDERAL DEFENDANTS WHO HAD INITIATED THE CREATION OF THE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS IN NORTH CAROLINA?

THE PARTIES

Appellants, Plaintiffs in the action below, are as follows:
Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy Bullock.

Appellees, Defendants in the action below, are as follows:
William Barr, in his official capacity as Attorney General of the United States; John Dunne, in his official capacity as Assistant Attorney General of the United States, in charge of the Civil Rights Division; James G. Martin, in his official capacity as Governor of the State of North Carolina; James Gardner, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; Daniel T. Blue, Jr., in his

official capacity as Speaker of the North Carolina House of Representatives; Rufus L. Edmisten, in his official capacity of Secretary of the State of North Carolina; The North Carolina State Board of Elections, an official agency of the State of North Carolina; M.H. Hood Ellis, in his official capacity as Chairman of the North Carolina State Board of Elections; Gregg O. Allen, William A. Marsh, Jr., Ruth Turner, and June K. Youngblood, in their official capacities as members of the North Carolina State Board of Elections.

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OCTOBER TERM, 1992

No. _____

RUTH O. SHAW, et al.,

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APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JURISDICTIONAL STATEMENT

In this Congressional redistricting case, Appellants appeal from the final judgment of the United States District Court for the Eastern District of North Carolina, sitting as a three-judge Court pursuant to 28 U.S.C. § 2284, which, by

divided opinion,[1] dismissed Appellants' Complaint. As to the Appellees, Barr and Dunne (hereinafter the "Federal Defendants") the Court dismissed for both lack of subject matter jurisdiction and for failure to state a claim for relief. As to the remaining Defendants (hereinafter the "State Defendants"), dismissal was for failure to state a claim.

The Complaint alleges that the focus of the Defendants on race in the Congressional redistricting of North Carolina violated several provisions of the United States Constitution and was neither required nor authorized by the Voting Rights Act. Attorney General Barr, his subordinates, and the State

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[1] See concurring and dissenting opinion of Judge Voorhees in the Court below (App. A at p. 26a).

Defendants were all participants in creating for North Carolina a system of proportional representation in Congress based on race. This attempt has resulted in two majority-minority Congressional districts of "bizarre" shapes which have invited ridicule as "political pornography" and also have prompted attacks on grounds of partisan gerrymandering and irrationality.[2] Appellants respectfully submit that this jurisdictional statement presents questions so substantial -- and so basic for our system of government -- as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

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[2] See Pope v. Blue, No. 3:92 CV 71-P (W.D.N.C. Apr. 16, 1992), (three-judge court), appeal filed June 19, 1992 (No. 91-2038).

OPINIONS BELOW

The April 27, 1992 Order of the three-judge Court and the Opinion filed on August 7, 1992, have not yet been officially reported, but are set out in the accompanying Appendix A. The concurring and dissenting Opinion of Judge Voorhees is also attached thereto.

JURISDICTION

Appellants' Complaint in the Court below sought preliminary and permanent injunctive relief against enforcement of North Carolina's congressional redistricting statute, pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), 1361, and 2284, and 42 U.S.C. §§ 1983 and 1988; and, as amended, the Complaint also asked for declaratory relief pursuant to 28 U.S.C. § 2201. A three-judge Court was convened pursuant to 28 U.S.C. § 2284(a); and on April 27, 1992, the Court granted

the Motion to Dismiss filed by the Federal and State Defendants. A final Notice of Appeal was filed on May 27, 1992. Subsequently, the Chief Justice extended until August 25, 1992, the time for filing this appeal. Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under:

(a) Article I, Section 2 of the Constitution of the United States, which provides in pertinent part:

> The House of Representatives shall be composed of members chosen in every second year by the people of the several states; . . . .

(b) Article I, Section 4 of the Constitution of the United States, which provides in pertinent part:

> The times, places and manner of holding elections for senators and representatives shall be prescribed

> in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

(c) Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

(d) the Fifteenth Amendment to the constitution of the United States, which provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

(e) Title 42, Section 1973b of the United States Code, which provides in pertinent part:

> A violation of subsection (a) is

> established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are equally open to participation by members of a class of citizens protected by subsection (a), and that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(f) Title 42, § 1973l(b), which provides in pertinent part:

> No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 1973g of this title shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapters I-A to I-C of this chapter or any action of any Federal officer or employee pursuant hereto.

(g) Chapter 7 of the 1992 Extra Session Laws of North Carolina (hereinafter "Chapter 7"), the challenged congressional redistricting statute, which amends the North Carolina Elections Code, Chapter 163, Article 17 of the North Carolina General Statutes. Ten copies of Chapter 7 have been lodged with the Clerk of this Court and copies of this legislation and of maps reflecting the congressional districts created by Chapter 7 are contained in Appendices to the jurisdictional statement filed by the appellants with this Court on June 19, 1992, in Pope v. Blue, (Docket No. 91-2038)

STATEMENT OF THE CASE

On March 12, 1992, Appellants, who are all registered voters in North Carolina, brought this action against William Barr, in his official capacity as

Attorney General, Civil Rights Division (the "Federal Defendants") and against various North Carolina State officials and agencies (the "State Defendants") to challenge on constitutional and statutory grounds the Congressional redistricting plans adopted by the State of North Carolina.

The Complaint, as amended, alleges that, as a result of substantial population increases recorded in the 1990 decennial census, North Carolina gained an additional seat in the United States House of Representatives; and this increase from eleven to twelve necessitated Congressional redistricting, subject to the requirements of the Constitution of the United States, 2 U.S.C. § 2, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Accordingly, on July 9, 1991, the General

Assembly of North Carolina enacted legislation to redistrict the State into twelve Congressional districts.[3]

Because forty of North Carolina's one hundred counties are subject to the preclearance provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, the redistricting legislation could not take effect until the State either obtained preclearance from the Attorney General or secured a favorable declaratory judgment in the United States District Court for the District of Columbia. When the State sought preclearance from the Attorney General, he objected to the 1991 Congressional redistricting legislation because it had created only one majority-minority district.

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[3] Chapter 601 of the North Carolina Session Laws of 1991.

In response to the Attorney General's objection, the General Assembly made a second effort and early in 1992 enacted Chapter 7 of the North Carolina Extra Session Laws, which created two majority-minority Congressional districts. One, the First District, is in the eastern section of North Carolina extending from the Virginia State line southward to the South Carolina State line; and it "looks like a Rorschach ink-blot test." (See Opinion of Judge Voorhees, Appendix A at 37a .) The other majority-minority district, the Twelfth, is "a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across Piedmont North Carolina from Durham to Gastonia". (See Opinion of Judge Phillips, App. A at 4-5a). Two of the Appellants reside in this District, which "slinks down the Interstate Highway

85 until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters." (Opinion of Judge Voorhees, App. A at 37a).

This redistricting, under which "many precincts, counties, and towns in North Carolina are divided among two or even three Congressional districts", (see Opinion of Judge Phillips, App. A at 5a), invites attack on several grounds, see Pope v. Blue, supra n.2; but Appellants' Complaint targets the racial gerrymandering which underlies the redistricting.[4] The premise of the

[4] The term "gerrymander" was coined when, at the insistence of Eldridge Gerry, then Governor of Massachusetts, at least one Congressional district was drawn in 1812 in the shape of a salamander. The North Carolina Congressional redistricting has been labeled "political pornography". (See article cited in Judge Voorhees' Opinion. (App. A at 56a).

Complaint is that the Constitution does not permit a State legislature, the Congress, or even both acting together, to create a system of proportional representation by race in the United States House of Representatives.[5] The Complaint alleges that, in requiring the North Carolina legislature to create two majority-minority districts, the Federal Defendants violated Article I, Sections 2 and 4; Article IV, Section 2; and the Fifth and Fifteenth Amendments of the Constitution. The actions of the State Defendants in creating the two majority-minority Congressional districts are alleged to have violated Article I, Sections 2 and 4, and the Fourteenth and Fifteenth Amendments. The Complaint, as amended, asks for both injunctive and

[5] North Carolina's population is 76% white; 22% black; and 2% other.

declaratory relief.

The State Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim for relief. Subsequently the Federal Defendants moved to dismiss for failure to state a claim for relief and under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. On April 27, 1992, a three-judge panel of the United States District Court convened pursuant to 28 U.S.C. § 2284, heard oral argument, and then entered an Order granting the motions of all the Defendants. On May 27, 1992, a timely Notice of Appeal was filed; and an order was entered extending appellants' time to file their appeal with this Court.

On August 7, 1992, a majority Opinion was filed in the District Court and a concurring and dissenting Opinion was

filed by Judge Voorhees. (Appendix A). These opinions and the jurisdictional statement and exhibits filed in this Court in Pope v. Blue, supra, note 2, provide extensive factual background for this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

The Congressional redistricting necessitated by the 1990 decennial census has presented many substantial questions, some of which this Court has already decided. Franklin v. Massachusetts, ____ U.S. ____, 112 S.Ct. 2767 (1992) and U.S. Department of Commerce v. Montana, ____ U.S ____, 112 S.Ct. 1415 (1992). However, none of these issues is so important to our nation's system of government as those presented by the purposeful use of race in the creation of Congressional districts. The majority-minority districts, which

have been insisted upon by the Attorney General under his interpretation of the Voting Rights Act and which State legislatures have created with varying degrees of willingness, threaten the concept that our "Constitution is color-blind." See Plessy v. Ferguson, 163 U.S. 537, 555, 559 (1896) (Harlan, J., dissenting) (Civil War amendments "removed the race line from our governmental systems"); cf. Brown v. Board of Education, 347 U.S. 483 (1954). They repudiate this Court's efforts to eliminate race as a basis for political, social, or economic classification. Moreover, the shackles imposed on our political system by these majority-minority districts in North Carolina and elsewhere will remain in place until the next decade -- indeed, the next century and millenium -- unless removed now by

this Court.

The reliance of the Court below upon United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) (hereinafter U.J.O.) -- where no majority opinion was filed -- makes clear the need for this Court to answer the questions posed here as to that decision's continuing viability and the meaning of terms like "racially discriminatory purpose" and "invidious intent". The lower Court's rejection of Appellants' standing is so inconsistent with this Court's treatment of standing in Powers v. Ohio, 499 U.S. _____, 111 S.Ct. 1364 (1991) as to raise a substantial -- and important -- question.

In view of the great power given the Attorney General by the Voting Rights Act, as amended, it also is imperative for this Court to answer the questions whether that official's insistence on achievement of

racially proportionate representation by means of majority-minority districts is based on a misreading of 42 U.S.C. § 1973 and whether individual voters may obtain judicial relief against the Attorney General for his misguided, but successful, effort to impose an unconstitutional requirement on State legislatures in North Carolina and elsewhere.

I.

DID THE NORTH CAROLINA LEGISLATURE VIOLATE ARTICLE I, SECTION 2, AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY CREATING TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR THE PURPOSE OF ASSURING THE ELECTION OF MINORITY PERSONS FROM THESE DISTRICTS TO SERVE IN THE UNITED STATES HOUSE OF REPRESENTATIVES?

Article I, Section 2 provides that: "The House of Representatives shall be composed of Members chosen every second year by the People of the several States. . . ." Appellants submit that in this context -- just as in the Preamble to the

Constitution -- "the People" is a unifying concept and allows no leeway for racial classification of voters.[6] Admittedly, as the Court below emphasized, Article I, Section 2 has been relied on heretofore almost exclusively as a justification for strict enforcement of the "one person, one vote" standard in Congressional redistricting (App. A at 15a); cf. Wesberry v. Sanders, 376 U.S. 1 (1964). Moreover, the lower courts have refused to treat Article I, Section 2 as a safeguard against political gerrymandering. Even so, appellants submit that a substantial

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[6] Appellants submit that the words "the People", as used in Article I, section 2 and in the Preamble have a significance akin to that of those same words as used in Lincoln's Gettysburg Address or of "one nation" in the Pledge of Allegiance. Such language is at odds with the apartheid imposed by majority-minority congressional districts.

question remains as to whether Article I, Section 2 -- as modified by Section 2 of the Fourteenth Amendment to eliminate an earlier implicit racial classification -- permits racial gerrymandering to achieve proportional representation by race in the House of Representatives.[7]

Appellants find support for their interpretation of Article I, Section 2 -- and of the Fourteenth and Fifteenth Amendments -- in the language of Judge Eisele writing for the majority in Turner v. Arkansas, 784 F.Supp. 553 (E.D. Ark. 1991), aff'd ____ U.S. ____, 112 S.Ct. 2296 (No. 91-1615) (June 1, 1992). As he pointed out,

> The idea that race or ethnicity, or

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[7] Appellants also question whether Congressional elections based on racial classifications conform to the constitutional guarantee of a "Republican Form of Government", Art. IV, § 4.

> language, or religion might become the basis for distributing voters during the periodic redistricting process runs counter to our professed belief in the 'oneness' of American political life and to the belief in Democracy itself with its emphasis on the individual citizen.

(Id. at 562)[8]

Contrary to the view of the court below (App. A at 14-15a), Article I, Section 4 is relevant to Appellants' claims because this Constitutional

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[8] Judge Eisele also explained that ". . . ethnic boundaries by diminishing the sense of common citizenship, may 'ultimately smother democratic choice and threaten democratic institutions', Id. at 560 (quoting Abigail Thernstrom and Don Horowitz) . . . "There is no coherent political philosophy, political principle or political program subsumed under such group labels as 'black citizens', 'white citizens', 'Asian citizens', or 'Hispanic citizens'. Historically, we Americans have opted to pursue the ideal of equal political opportunity for each individual citizen. The standard is 'one person, one vote'. When we speak in terms of 'group political rights' for such categories of voters we are immediately in deep water, for so much of real political significance may be hidden under such group labels." Id. at 562.

provision, along with the Fifteenth Amendment, defines the power of Congress in prescribing how Congressional elections shall be conducted. Appellants submit that this power of Congress is not so broad as to permit Congress to enact legislation which provides for racial quotas or proportionate representation in Congressional redistricting. Because the Federal Defendants have construed the Voting Rights Act to require the creation of majority-minority Congressional districts for the purpose of electing minority persons from these districts -- and thereby initiated the creation of North Carolina's "bizarre" redistricting plan -- it is important for this Court to answer now whether Article I, Section 4 and the Fifteenth Amendment empower Congress to require or permit Congressional redistricting along racial

lines.

The Fifteenth Amendment protects the right to vote against denial or abridgement by either State or Federal officials "on account of race, color, or previous condition of servitude". Racial gerrymandering violates this Amendment. G2omillion v. Lightfoot, 364 U.S. 339, 346 (1960). Appellants submit that, therefore, a substantial question is raised as to how North Carolina's creation of "grotesque" majority-minority Congressional districts can escape this constitutional prohibition.

The lower Court considered that the Constitutional issues raised by Appellants should be approached in terms of Fourteenth Amendment equal protection guarantees.[9] (App. A at 16a). From

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[9] The Fifth Amendment's due process clause, which applies to the Federal Defendants, contains an equal protection

this standpoint the outcome seems equally clear. Not only did this Court in 1954 unanimously disavow the drawing of racial lines in education, Brown v. Board of Education, supra; but also it applied thereafter in other fields Justice Harlan's concept of a "color-blind" Constitution, See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Reconstruction statute precluded race-based refusals to sell or lease real estate); Runyon v. McCrary, 427 U.S. 160 (1976) (race-based refusals to contract prohibited); McDonald v. Santa Fe Travel Transportation Co., 427 U.S. 273, 295 (1976) (42 U.S.C. § 1981 prohibits racial discrimination against whites in terminating employment); Anderson v.

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component. cf. Bolling v. Sharpe, 347 U.S. 497 (1954).

Martin, 375 U.S. 399 (1964) (statute invalid which provided for description of candidate's race on ballot); Reitman v. Mulkey, 387 U.S. 369 (1967) (overturning California constitutional provision allowing property owner to consider race of buyer or lessee); and other cases discussed in William Van Alstyne, Rites of Passage: Race, the Supreme Court and the Constitution, 46 U. Ch. L. Rev. 775 (1979).

The distaste for racial classifications is also reflected in recent decisions of this court. For example, race may not be used in peremptorily challenging potential jurors. cf. Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364 (1991); a plan for racial set-asides of municipal contracts must receive "strict scrutiny" to determine if there is identified past discrimination which

justifies the race-based relief, Richmond v. J.A. Croson Co, 488 U.S. 469 (1989); and, in remedying unconstitutional school segregation, racial balance is not to be achieved for its own sake but is to be pursued only when racial imbalance is caused by past constitutional violations, Freeman v. Pitts, ____ U.S. ____, 112 S.Ct. 1430, 1447. (1992).

In light of these precedents, a substantial question is presented as to the constitutionality of a Congressional redistricting plan which, without any "strict scrutiny" or any demonstration that an abuse exists to be remedied,[10]

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[10] Appellants are unaware of evidence presented by anyone that heretofore race has played any role in the drawing of boundaries for North Carolina's congressional districts. So far as Appellants know, the shape of congressional districts in North Carolina has not been a cause for the absence of any black person from North Carolina in the Congress. Minorities in North Carolina simply are not geographically

employs racial classifications -- and de facto racial quotas -- in the election of members of the House of Representatives. Cf. Chisom v. Roemer, ____U.S.____, 111 S.Ct. 2354 (1991) (Kennedy, J. dissenting) (decision does not address constitutionality of Section 2 of Voting Rights Act of 1965).

II.

DID THE COURT BELOW ERR IN HOLDING THAT UNITED JEWISH ORGANIZATIONS, INC. V. CAREY, 430 U.S. 144 (1977) AUTHORIZED THE NORTH CAROLINA LEGISLATURE TO CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS FOR A RACIALLY CONSCIOUS PURPOSE?

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compact enough to give them a majority in any congressional district with boundaries delineated by use of sound districting principles, such as "compactness". Cf. Thornburg v. Gingles, 478 U.S. 30, 46-7, 49 n.17 (1986). In 1966 North Carolina was judicially directed to create "compact" and "contiguous" Congressional districts. Drum v. Seawell, 249 F.Supp. 877 (M.D.N.C.) (1966), aff'd 383 U.S. 831 (1966); and so far as Appellants are aware, the State complied with those requirements until 1991, when the Federal Defendants intervened.

The Court below reasoned that United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (hereinafter U.J.O.) permitted the North Carolina legislature to redistrict with a racially conscious purpose so long as it sought "to meet the broad remedial requirements of the Voting Rights Act". (App. A at 19a)[11] This proposition seems suspect on its face. Certainly there is a substantial question as to why a State legislature may engage in blatant gerrymandering -- racial or otherwise -- merely because it believes that, in doing so, it is carrying out the intent of Congress or the will of the Attorney General.

The lower Court's reliance on U.J.O. to uphold this "Nuremberg defense" is even more questionable because only a

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[11] In his dissent Judge Voorhees took a more limited view of U.J.O. (App. A at 30a).

plurality opinion was rendered in that case; the decision preceded the 1982 amendment of the Voting Rights Act and concerned state legislative districts, rather than Congressional districts;[12] and there was evidence of an abuse that needed remedy. In announcing the plurality's opinion in U.J.O., Justice White stated:

> we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be the majority.

(430 U.S. at 168) (emphasis added)

On the other hand, the North Carolina Legislature rejected "sound districting

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[12] "One person, one vote" jurisprudence has recognized the difference between Congressional districts and State legislative districts.

principles" -- except for population equality; ignored "residential patterns"; and engaged in "computer-generated political pornography" in order to establish majority-minority congressional districts.

Finally, as Appellants argued in the Court below, U.J.O. is out of step with this Court's more recent jurisprudence. Thus, the Court should answer whether U.J.O. authorizes the use of racial classifications to create majority-minority districts and ensure the election of a quota of minority persons to Congress from North Carolina, even though no "strict scrutiny" has been given to the purported justification for this racial gerrymandering[13] and no indication exists

[13] In Quilter v. Voinovich, No. 5:91 CV-2219 (N.D. Ohio) a three-judge Court held that the creation of majority-minority districts was not supported by "the requisite findings". On June 1, 1992, this Court noted probable jurisdiction of the appeal sub nom. Voinovich v. Quilter, ____U.S.____, 112 S.Ct. 2299.

that heretofore the shape of the State's Congressional districts has had any relation to the failure to elect minority persons to Congress from North Carolina.[14]

III.

DID THE NORTH CAROLINA STATE LEGISLATURE HAVE A RACIALLY DISCRIMINATORY OR INVIDIOUS PURPOSE WHEN IT CREATED TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS AT THE INSISTENCE OF THE FEDERAL DEFENDANTS?

The State Defendants claim that they lacked a racially discriminatory or

[14] Indeed, the length to which the North Carolina General Assembly was forced to go in order to create two majority-minority districts demonstrates that the shape of previous Congressional districts had nothing to do with the failure of voters to elect minority persons to Congress.

invidious purpose because they created two majority-minority districts at the insistence of the Federal Defendants. This contention confuses motive with purpose and intent. As Justice Douglas once explained, any state-sponsored preference to one race over another is "invidious". De Funis v. Odegard, 415 U.S. 312, 337, 342, 343-44 (1974) (Douglas, J., dissenting).

No statutory or constitutional right exists for persons of one race to be represented in Congress by persons of the same race.[15] Nonetheless, as alleged in the Complaint, the State Defendants created two majority-minority districts

[15] Even under Section 2 of the Voting Rights Act, as amended, minority persons only have a right to participate in the political process, rather than to be represented by persons of their own race. Chisom v. Roemer, 111 S. Ct. 2354 (1991).

for the purpose of assuring that two minority persons would be elected to the House of Representatives. Whether such a purpose is "discriminatory" for equal protection purposes is a substantial question that merits an answer from this Court.

IV.

DID THE ATTORNEY GENERAL MISINTERPRET AND MISAPPLY THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, IN REQUIRING THAT NORTH CAROLINA CREATE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS?

The Voting Rights Act -- on which both the State and Federal Defendants rely -- neither requires not authorizes the creation of majority-minority districts. Indeed, when 42 U.S.C. § 1973 was amended in 1982, Congress added the proviso that this section of the United States Code does not authorize proportional representation. Moreover, Thornburg v. Gingles, 478 U.S. 30, 50 (1986), makes

clear that the Voting Rights Act does not authorize the creation of majority-minority districts which are not "geographically compact". The Federal Defendants continue to press for the creation of majority-minority districts at the expense of compactness;[16] and so the time has come for this Court to answer whether, despite the legislative disclaimer in 42 U.S.C. § 1973, Congress intended to allow the Attorney General to require North Carolina -- or any other state -- to create majority-minority districts and to do so without any "strict scrutiny" and in utter disregard of "sound districting principles" such as compactness.

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[16] This Court has made clear that the Attorney General need not be treated as infallible in his interpretation of the Voting Rights Act. Presley v. Etowah County Commissioners, ____ U.S. ____, 112 S.Ct. 820 (1992).

V.

DO WHITE VOTERS HAVE STANDING TO SEEK RELIEF FROM CONGRESSIONAL REDISTRICTING WHICH WAS INTENDED BY BOTH THE STATE AND FEDERAL DEFENDANTS TO RESULT IN THE ELECTION OF MINORITY PERSONS TO CONGRESS FROM TWO MAJORITY-MINORITY DISTRICTS?

The Court below reasoned that Appellants -- all five of whom are white -- lack standing to complain, because the "plan demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis" and because there is "no cognizable constitutional injury if [an Appellant's] particular candidate should lose by virtue of the district's racial composition". (App. A at 24a). A parallel argument was rejected by this Court in Powers v. Ohio, supra, where a white defendant successfully challenged a prosecutor's use of peremptory challenges to exclude black jurors.

The Appellants are asserting their

constitutional right to vote in a congressional district created in a race-neutral manner, just as the defendant in Powers asserted his right to a race-neutral trial. The circumstance that minority voters have the same right to a rate-neutral electoral process does not destroy Appellants' claim for relief.[17] The "cognizable constitutional injury" seems especially clear as to the two Appellants who are registered to vote in the serpentine Twelfth District -- which was created in a manner intended to guarantee that a minority person would be elected therefrom to Congress. In short,

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[17] In Powers, supra, the white defendant did not lose his right to a jury selected in a "race-neutral" manner even though a black defendant would have had the same right. See also McDonald v. Santa Fe Travel Transportation Co., supra, which held that white employees are entitled to relief from employment termination based on race.

these two white Appellants will be represented in Congress by a black person because the Federal Defendants and the State Defendants unconstitutionally decided this should occur.

Contrary to the rationale of the court below, it is irrelevant that, because of the probable election of white candidates from other congressional districts, the "white voters on a statewide basis" will not be underrepresented in Congress. Furthermore, the two Appellants in the Twelfth District suffer "cognizable constitutional injury" because the State Defendants placed them in a "grotesque" 160-mile long, racially-gerrymandered, congressional district, in which the lack of compactness deprives them of the opportunity for political participation they would possess in a district formed

pursuant to the "sound districting principles" mentioned in Justice White's plurality opinion in U.J.O., 430 U.S. at 168. Thus, due to the drawing of district boundaries along racial lines they have been placed at a disadvantage in participating politically in comparison with voters in other congressional districts, which are more compact. The question whether white voters -- like Appellants -- have standing to complain of racial gerrymandering in redistricting is substantial and merits a definitive answer from this Court.

VI.

WERE THE APPELLANTS ENTITLED TO SUE THE FEDERAL DEFENDANTS WHO HAD INITIATED THE CREATION OF THE TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS IN NORTH CAROLINA?

The Federal Defendants claim that 42 U.S.C. § 1973l(b) precludes any action against them in any Court other than the

District Court for the District of Columbia. Furthermore, according to them, only a State or a governmental subdivision thereof may sue the Federal Defendants in the District Court of the District of Columbia; and so, by their logic, they are totally immune from suit by Appellants or any other individuals whose constitutional rights have been violated at the instance of these Defendants.

Appellants recognize that federal courts may not interfere with the Attorney General's exercise of discretion to determine whether to preclear or not preclear a redistricting plan, Morris v. Gressette, 432 U.S. 491 (1977). However, even this decision recognizes that aggrieved persons may obtain judicial review of final agency action unless there is persuasive reason to believe that Congress intended to prohibit it.

Moreover, private persons remain free after preclearance to attack the constitutionality of redistricting in the traditional manner. Allen v. State Board of Elections, 393 U.S. 544 (1969). With these principles in mind, Appellants submit that the Federal Defendants were properly joined in this suit and should not have been dismissed.

In the first place, the Complaint, as amended, includes a prayer for declaratory relief -- which falls outside the language of 42 U.S.C. § 1973l(b).[18] Secondly, the Appellants are not seeking to control the exercise of the Attorney General's discretion, but instead to prevent him from acting outside the scope of his discretion. Third, because of the

[18] The preclusion of declaratory judgments by § 1973l(b) is only for actions under § 1973b or § 1973c and does not apply to Appellants' Complaint.

Attorney General's preclearance authority, his presence as a Defendant in the case is necessary in order that meaningful relief can be given. Cf. U.J.O., supra, at 153, n.13. In short, in the interest of judicial economy -- and consistent with concepts of pendent jurisdiction[19] -- the Federal Defendants should be retained in the case; otherwise, by denying preclearance in the future for a congressional redistricting plan which does not include two majority-minority districts, the Attorney General as a practical matter can prevent Appellants from receiving promptly the relief to

[19] See, e.g., Lake v. State Board of Elections of North Carolina, Civ. No. 291 CV 002540 (M.D.N.C. March 31, 1992); Weintraub v. Hanrahan, 435 F.2d 461, 463 (7th Cir. 1970). Cf. Fed. R. Civ. P. 19(a).

which they are entitled.[20] This question of the liability of the Attorney General is substantial and calls for a prompt decision by this Court.

[20] The Attorney General's preclearance authority already has been used to cause "cognizable constitutional injury" to appellants, all of whom reside in one of the sixty North Carolina counties not subject to preclearance.

CONCLUSION

The questions posed are substantial and important to the future of the electoral process in the United States. They deserve plenary consideration by this Court after briefs have been submitted and oral argument has taken place.

Respectfully submitted,

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August 25, 1992

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No.
92-202-CIV-5-BR
(THREE-JUDGE DISTRICT COURT)

RUTH O. SHAW, et al,

Plaintiffs,

v.

WILLIAM BARR, et al.,

Defendants.

Before PHILLIPS, Circuit Judge, BRITT, District Judge*, and VOORHEES, Chief District Judge**

*of the Eastern District of North Carolina
**of the Western District of North Carolina

MEMORANDUM OPINION

PHILLIPS, Circuit Judge, with whom BRITT, District Judge, joins:

Plaintiffs Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy G. Bullock, all citizens of the State of North Carolina and registered voters in Durham County, brought this action against William

Barr, in his official capacity as Attorney General of the United States, and John Dunne, in his official capacity as Assistant Attorney General of the United States, Civil Rights Division (hereinafter, together, the "federal defendants"), and against various North Carolina state officials and agencies (hereinafter, collectively, the "state defendants"), challenging on constitutional and statutory grounds the congressional redistricting plan adopted by the State of North Carolina. Jurisdiction of this three-judge district court is based on 28 U.S.C. §§ 1331, 1343, and 2284, and 42 U.S.C. §§ 1983 and 1988. The case came before us on motions of both the federal and the state defendants to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state claims against them upon which relief could be granted, and of the federal defendants to dismiss as well under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Following a hearing on the motions, we concluded that they should be granted, announced our decision orally, and entered an order of dismissal on April 27, 1992. Issuance of a written opinion was deferred in view of the imminence of the Democratic and Republican primary elections scheduled for May 5, 1992.

I

As a result of population increases reflected in the 1990 Decennial Census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. Accordingly, on July 9, 1991, the General Assembly of North Carolina enacted legislation to redistrict the state into twelve congressional districts. The redistricting plan as originally enacted included one district, the First District, that had a majority of black persons of voting age, and of black persons registered to vote. This proposed majority-minority district was centered in the northeastern part of the state.

Because 40 of North Carolina's 100 counties are covered by the special provisions of Section 5 of the Voting Rights Act, the General Assembly submitted its redistricting plan for preclearance by the Attorney General of the United States.[1] On December 18, 1991, the Attorney General, by letter of the Assistant Attorney General, Civil Rights Division, interposed formal objection, under Section 5, to the General Assembly's proposed redistricting plan.

Objection was based on the fact that "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state." Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991). It appeared, the letter asserted, that the General Assembly "chose not to give effect to black and Native-American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority

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[1] In jurisdictions covered by the special provisions of Section 5, any change in voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting may be submitted to the United States District Court for the District of Columbia "for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or

> be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

42 U.S.C. § 1973c.

concentration in this part of the state." *Id.*[2] It was also noted that the General Assembly

> was well aware of significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. . . . These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons.

Id.

In response to the Attorney General's objection to the proposed redistricting plan, the General Assembly enacted the redistricting legislation at issue here (the "Plan") on January 24, 1992. The Plan creates a second majority-minority district, the Twelfth District, not in the south-central to southeast area of North Carolina, where many had advocated locating a second majority-minority district, but in a thin band, sometimes no wider than Interstate

[2] With regard to the one majority-minority district created in the proposed redistricting plan, it was noted that

> [t]he unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or effect of minimizing minority voting strength in that region.

Id.

Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia.[3] As a result of the tortured configuration of the Twelfth District and other features of the Plan, many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts. Plaintiffs are residents of an area that was so affected. Before the challenged redistricting, plaintiffs Shaw, Shimm, Robinson Everett, and Bullock, all residents of Durham County, had been registered to vote in the Second District. Under the Plan, Shaw and Shimm will vote in the Twelfth District; Robinson Everett and Bullock will continue to vote in the Second District. Plaintiff James Everett, also a resident of Durham County, registered to vote after the Plan was adopted. He will vote in the Twelfth District.

Plaintiffs then brought this action on March 12, 1992, seeking as end relief a permanent injunction against implementation of the Plan on the ground that it is unconstitutional, and in the interim a preliminary injunction and temporary restraining order enjoining the appropriate state defendants from "taking any action in preparation for primary or general elections for the U. S. House of Representatives." Complaint at 16. Following designation of this three-judge court and upon indications that both the state and federal defendants proposed filing motions to dismiss the claims against them on dispositive legal grounds, a scheduling order was entered to permit hearing of the

[3] In creating the Plan, the Democratically controlled General Assembly rejected plans offered by both Republicans and nonpartisan groups for locating the second majority-minority district in the south-central to southeast part of the state.

The Republican Party of North Carolina and various other plaintiffs lodged a political gerrymandering attack on the Plan, contending primarily that rejection of their proposed plans in favor of that adopted was motivated essentially by an intent to protect Democrat incumbents. That suit recently was dismissed by another three-judge district court. *Pope v. Blue*, No. 3:92CV71-P (W.D.N.C. Apr. 16, 1992).

motions before the scheduled primary on May 5, 1992. The matter then came on for hearing on April 27, 1992, as scheduled, and was considered by the court on the pleadings, the motions to dismiss with supporting and opposing legal memoranda, and oral argument of the parties. Because of the imminence of the scheduled primary elections on May 5, 1992, we announced orally our decision to grant the motions and entered an order of dismissal on April 27, 1992, deferring issuance of a written opinion. Our reasons for decision follow.

II

Preliminarily, we note that in entertaining and deciding motions to dismiss on the merits or on subject matter jurisdiction grounds on the basis of bare-bones pleadings, courts are under special obligation to construe the pleadings liberally in favor of the pleader, especially in considering motions to dismiss for failure to state claims under Fed. R. Civ. P. 12(b)(6). *See generally* 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1357 (1990) (hereinafter *Wright & Miller*). Indeed, where any perceived pleading insufficiency relates only to factual matters, dismissal on the merits is ordinarily inappropriate, with leave to amend and deferral of decision to summary judgment or trial on appropriately amended pleadings and discovery materials being the appropriate course. *Id.* at 360-67. When, however, it is apparent from the pleadings, motions, legal memoranda, matters of public record, and other matters properly within the range of judicial notice, that only legal issues are presented, decision on the merits may be appropriate without the need for further factual development, whether by pleading amendment, discovery, or evidentiary proceedings. This is true even where decision requires analysis of difficult constitutional issues and involves rejection of constitutional claims asserted by the pleader on their basis. *See, e.g., United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1976) (constitutional

voting rights claim); *Bowers v. Hardwick*,478 U.S. 186 (1986) (constitutional "privacy" claim). In considering whether a pleading is thus legally rather than merely factually insufficient, however, a court must in fairness at this early stage inquire whether the allegations could support relief on *any* legal theory within the range of reason and the ultimate constraints of the adversarial process. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Harrison v. U.S. Postal Service*, 840 F.2d 1149, 1152 (4th Cir. 1988).

We have considered the claims here in light of these general principles and the related familiar ones that all purely factual allegations, but not legal conclusions, in the complaint are to be taken as true, etc. 5A *Wright & Miller* § 1357, at 304-21.

III

We first address the claim alleged against the federal defendants and challenged by their motions to dismiss on jurisdictional and merits grounds.

The gist of this claim as pleaded is that in first declining to preclear North Carolina's original redistricting plan, which included only one majority-black district, then preclearing the one here under specific attack which has two, Attorney General Barr and Assistant Attorney General Dunne made an "unconstitutional interpretation and application of the Voting Rights Act." Complaint at 2. This unconstitutional action by the federal defendants is then alleged to have "coerce[d] the [state] defendants into adopting and implementing an unconstitutional plan of redistricting." *Id.* at 3. As fleshed out somewhat in plaintiffs' legal memorandum, the underlying legal theory of the claim is that in their successive acts of denying preclearance of the first plan, then preclearing the second plan they successfully had "coerced," the federal defendants had either misinterpreted 42 U.S.C. § 1973(b), amended Section 2 of the Voting Rights Act, and in consequence applied it un-

constitutionally or, if they interpreted it correctly, had applied a facially unconstitutional provision of the Act to accomplish an unconstitutional end. Complaint at 11; Response to Motion to Dismiss at 5. The unconstitutional end, whether resulting from misinterpretation of a constitutional statute or from application of an unconstitutional statute, is alleged to be the intentional concentration of majority populations of black voters in districts that are in no way related to considerations of compactness, contiguousness, or jurisdictional communities of interest. This appears from the prayer for relief against the federal defendants, which is that they be enjoined from

> imposing, directly or indirectly, any preclearance requirement that any Congressional District in the State of North Carolina have a majority population of persons in any particular race or color, and . . . from taking any action, whether under the Voting Rights Act, or otherwise, to establish or to encourage or require establishment of, a redistricting plan whereunder persons of a particular race or color . . . would be concentrated in a Congressional district that is in no way related to considerations of commpactness [*sic*], contiguousness and geographic or jurisdictional communities of interest.

Complaint at 15.

In essence then, this claim attempts to attack the constitutionality of the Voting Rights Act—most specifically, amended Section 2 of the Act—either facially or as applied, by challenging the actions of the named federal defendants taken under Section 5 of the Act to enforce its provisions.

The federal defendants' motion to dismiss this claim is based on two grounds: (1) that under Section 14(b) of the Voting Rights Act, 42 U.S.C. § 1973*l*(b), this court lacks subject matter jurisdiction to entertain it, and (2) that to the extent it seeks judicial review of the Attorney General's actions taken pursuant to Section 5 of the Voting Rights Act, it does not state a cognizable federal claim.

We consider these in turn. Because the exact nature of the plaintiffs' claim of unconstitutionality is not relevant to the grounds upon which the motion to dismiss is made, we need not attempt to identify them in considering this motion.

A

Section 14(b) of the Voting Rights Act provides in pertinent part that

> [n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any . . . restraining order or temporary or permanent injunction against the execution or enforcement of [Section 5, *inter alia*] or any action of any Federal Officer or employee pursuant thereto.

The federal defendants contend that this provision plainly confers exclusive original jurisdiction of a claim such as plaintiffs' upon the District Court for the District of Columbia,and that this court therefore lacks subject matter jurisdiction to hear the claim. We agree.

Section 14(b) is a concededly drastic jurisdictional limitation which has nevertheless been upheld by the Supreme Court against due process challenge. *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). As interpreted, it applies to any action, whether brought by a governmental or private litigant, that raises "substantive discrimination" questions, including, of course, challenges to the Act's very constitutionality, as contrasted to actions that seek merely to determine the "coverage" of various provisions of the Act in advance of specific applications. *Compare Allen v. State Board of Elections*, 393 U.S. 544, 558-59 (1969) (action by private litigant for declaratory judgment as to § 5

coverage of particular state enactment not subject to § 14(b) limitation) *with Reich v. Larson*, 695 F.2d 1147, 1149-50 (9th Cir. 1983) (action by private litigant challenging constitutionality of Voting Rights requirement for bilingual printing of candidacy statements subject to § 14(b) jurisdictional limitation; *Allen* action distinguished). *See also McCann v. Paris*, 244 F.Supp. 870, 872-73 (W.D. Va. 1965) (§ 14(b) covers action by private litigants challenging that provision's own constitutionality).

Within these interpretations, the plaintiffs' action plainly is covered by Section 14(b). It specifically challenges the constitutionality of the Voting Rights Act by attacking the actions of federal officials in enforcing the provisions of Section 5. The relief sought is precisely the issuance of injunctive decrees against this and comparable future acts of enforcement.

Plaintiffs have sought to avoid Section 14(b)'s limitation by amending their prayer for relief to seek declaratory relief in addition to the injunctive relief originally sought as their sole remedy. This pleading device cannot avoid the Section 14(b) limitation. The relief prayed still rests on a claim of unconstitutionality, and challenges the enforcement efforts of the Attorney General under Section 5.

The action therefore remains of the type contemplated by Section 14(b). *See Allen*, 393 U.S. at 558 ("The § 14(b) injunction action is one aimed at prohibiting enforcement of the provisions of the Voting Rights Act, and . . . involve[s] an attack on the constitutionality of the Act itself."). A mere addition to (or complete change, had that been attempted) in the form of specific relief prayed cannot undo that critical aspect of the claim. *See Reich*, 695 F.2d at 1149 (action alleging unconstitutionality of Voting Rights provision and seeking "declaratory and other appropriate relief" against its enforcement held subject to Section 14(b)).

Accordingly, we conclude that under Section 14(b), this court lacks subject matter jurisdiction over the claim against the federal defendants. They are entitled on that basis to dismissal of the claim under Fed. R. Civ. P. 12(b)(1).

B

The federal defendants also contend that to the extent the claim against them involves a challenge to the Attorney General's exercise of the discretionary power conferred on him by Section 5 to make preclearance decisions, it fails to state a cognizable federal claim. Specifically, they contend that *Morris v. Gressette*, 432 U.S. 491 (1977), long since has established that such discretionary decisions are not subject to judicial review in any court. We agree.

Without belaboring the point, we note that *Morris* makes it in the most emphatic way possible: by conceding that the result is to shield from direct judicial review even the most egregious defaults of an Attorney General, including any that might be prompted by the crassest of political considerations. *Id.* at 506 n. 23. As the court pointed out (after disclaiming any assumption of such malfeasance), under the concededly drastic provisions of the Voting Rights Act viewed whole, a Section 5 preclearance decision (or non-decision) by the Attorney General, whether up or down, is not the end of the legal road for any person or governmental entity disfavored by it. If objection is interposed, the disfavored governmental entity may seek preclearance in a *de novo* judicial proceeding in the District Court for the District of Columbia. If objection is not interposed within the statutory time limit (whether by express decision or non-action) any persons—such as plaintiffs here—who consider their legal or constitutional rights violated by the state enactment thereby freed up may resort to the judicial avenues available for redress against the state enactment and its enforcers. In neither event does the Attorney General's decision have any legally preclusive

effect upon the follow-up judicial proceedings. *Id.* at 504-07 & n.21.

Plaintiffs' claim as pleaded against the federal defendants, whether viewed as being aimed only at the allegedly "coercive" effect of the challenged preclearance decisions upon later state action, or at the direct effect of these decisions upon plaintiffs' constitutional rights, inescapably is one seeking judicial review of those discretionary decisions. As such it fails to state a cognizable federal claim for relief. Accordingly, on this alternative ground as well as the jurisdictional limitations of Section 14(b), we conclude that the federal defendants are entitled to dismissal of the claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Bell v. Hood*, 327 U.S. 678 (1946).

IV

The gravamen of the plaintiffs' claim against the state defendants is that the General Assembly of North Carolina acted unconstitutionally in deliberately creating two congressional districts in which black persons constitute majorities of the overall voting-age and registered-voter populations.[4] This claim is expressed in various forms and

[4] As indicated in Part II, plaintiffs' complaint actually identifies as the primary unconstitutional conduct being challenged the action of the federal defendants in "misinterpreting and misapplying" Section 2 of the Voting Rights Act, thereby "coercing" the state defendants into becoming "unwilling participants" in a racially discriminatory, hence unconstitutional, redistricting process. Complaint ¶36, at 14. When the state defendants predictably picked up on this "unwilling participant" theory as an implicit concession by plaintiffs of the lack of any "invidious intent" on their part, Memorandum in Support of Motion to Dismiss (hereafter Dismissal Memorandum) at 5, the plaintiffs responded by disclaiming any such effect for the "unwilling participant" theory, dismissing it—with questionable logic, given that it was their own—as the state defendants' "devil-made-me-do-it" theory. Response at 24.

Though the anomaly is plain and may suggest a general weakness in plaintiffs' "derivative liability" theory, we do not ascribe it any ultimate significance in assessing the existence of invidious intent where that is an essential element of plaintiffs' claim. *See* Part IV(C)(2) *infra*.

A related possibility arising from this "derivative-liability" theory—that the federal defendants might be necessary parties to the claim against the "unwilling" state defendants—is not urged by the plaintiffs. *Cf. United Jewish Organizations*, 430 U.S. at 153-54 n.13. The only basis upon which the federal defendants are sought to be held in this action is as proper parties to the claim directly against them.

invokes several different constitutional provisions. In its most sweeping, but simplest, form, it baldly asserts that any state legislative redistricting driven by considerations of race—whatever the race, whatever the specific purpose, whatever the specific effect—is unconstitutional. Response at 5. On this basis, the claim alleges that to the extent the Voting Rights Act authorizes *any* race-conscious legislative redistricting, the Act is facially unconstitutional. Complaint ¶ 35, at 14; Response at 5. In the alternative, plaintiffs' claim seems to assert that in any event, race-based redistricting which is specifically intended to assure proportional representation of minority (or any?) races in Congress and fails properly to observe (undefined) considerations of contiguity, compactness, and communities of interest in drawing congressional districts to achieve that purpose—i.e., racial gerrymandering—is unconstitutional. On this basis, the claim asserts that in deliberately creating two black-voter majority congressional districts, the redistricting plan here challenged has both those vices, hence constitutes an unconstitutional application of the Voting Rights Act. Complaint at 15; Response at 3, 4. This claim, whatever its specific form, is grounded expressly in a number of constitutional provisions: the Equal Protection Clause of the Fourteenth Amendment; the Fifteenth Amendment; the Privileges and Immunities Clause of the Fourteenth Amendment; Article I, Section 2; and Article I, Section 4. Each of these provisions is alleged, in one

way or another relevant to its particular function, either to prohibit any race-conscious creation of congressional districts by state legislatures, or to prohibit the gerrymandered forms here challenged. We will consider these in turn, but in reverse order because, as will appear, we think the equal protection claim the only relevant, or most inclusive, one under developed constitutional doctrine respecting voting rights.

A

We first consider plaintiffs' claim under Article I, Section 4 of the Constitution. That Section provides that the "Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators." The gist of the Article I, Section 4 claim, as we understand it, is that the constitutional provision secures to the North Carolina legislature the right to create congressional districts free of the federal control exercised by the federal defendants here; and that the state's conduct in succumbing to that improperly exercised control violated the derivative right thereby secured to plaintiffs as citizens and registered voters of the state. Complaint ¶¶ 24, 26, at 10, 11; *id.* ¶ 37, at 14, 15.

This, so far as we are aware, is a novel claim in voting rights jurisprudence. No authority for such an interpretation of Article I, Section 4 is suggested, and we decline to recognize the individual right asserted under it. As we read the provision, it is simply a positive grant of power to the states to "prescribe" their own voting processes, subject only to congressional override of particular "regulations." To the extent the Voting Rights Act is an exercise of congressional override power, it operates to validate, rather than restrict, the state's redistricting action here. We do not read the provision to impose any

structural limitation on either the state's primary power to "prescribe" its electoral processes or on Congress's override power of control. There undoubtedly are constitutional limits on both, but they do not arise from Article I, Section 4 itself.

B

We next consider plaintiffs' claim under Article I, Section 2 of the Constitution, which provides that "[t]he House of Representatives shall be composed every second year by the people of the several states."

The theory piaintiffs seemingly advance is that this direct grant of power to the "people" to "compose" the House of Representatives directly confers upon all registered voters of the state a right to vote for representatives in districts not drawn on a race-conscious basis—a right, as the plaintiffs express it, not to have "the people divided" for this purpose "along racial lines." Complaint ¶¶ 34, 35, at 15; Response at 2, 3.[5]

We read Supreme Court precedent as confining the function of Article I, Section 2 to that of safeguarding the one-person-one-vote principle in matters of congressional redistricting. *See Mahan v. Howell*, 410 U.S. 315, 322 (1973) ("population alone . . . the sole criterion of constitutionality in congressional redistricting under Article I, Section 2"); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (Article I, Section 2 interpreted to require conformance to one-person-one-vote standard in congressional districting). Other lower courts share this understanding. All asked, so far as we are aware, to find further voting rights protections in this provision have declined to do so on this view of Article

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[5] This right is claimed not only to be directly secured to individual citizens by Article I, Section 2, but also to be further protected by the Privileges and Immunities Clause of the Fourteenth Amendment and by the Fifteenth Amendment. Complaint ¶¶ 34, 35, at 13, 14.

I, Section 2's limited equal-population function. *See, e.g., Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394, 397 (D.Md. 1991) (three-judge court) (Article I, Section 2's protection confined to one-person-one-vote principle; does not extend to claims of political gerrymandering); *Pope v. Blue*, No. 3:92 CV 71-P, slip op. at 11 (W.D.N.C. Apr. 16, 1992) (three-judge court) (same); *Badham v. March Fong Fu*, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988) (three-judge court) (same), *aff'd mem.* 488 U.S. 1024 (1989). Since Article I, Section 2 only proscribes districts of unequal population and plaintiffs make no such claim here, the claims they do make, accordingly, are not supported by Article I, Section 2.

C

We consider finally the allegations that the state's redistricting plan violates rights secured to plaintiffs by the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment, and by the Fifteenth Amendment. Because we think the Privileges and Immunities Clause inapposite to this voting rights claim,[6] and the Fifteenth Amendment's protection essentially subsumed within that provided by the Equal Protection Clause,[7] we confine analysis to the equal protection allegations.

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[6] Plaintiffs cite no authority for their assertion, Complaint ¶ 34, at 13, 14, that the right to vote for members of Congress is a "privilege" of national citizenship within the meaning of this clause. In the few cases of which we have been made aware in which the assertion has been made, it has been rejected. *See, e.g., Pope v. Williams*, 193 U.S. 621, 632 (1904); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 172-78 (1875). In any event, if this particular voting right were considered such a "privilege," its protection under this Clause could be no broader than that provided by the Equal Protection Clause, hence we do not consider it separately.

[7] Racial gerrymandering and vote dilution claims (of which plaintiffs' claim must surely be considered some "reverse" variety) have generally been treated as subject to the same analysis under the Equal Protection Clause and the Fifteenth Amendment. The essence of such a claim under either is state action that invidiously discriminates against the voting rights of some of the states' citizens on account of their race. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 621 (1982); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). If there is any significant difference, the protection afforded by the Equal Protection Clause is the broader. *See Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980) (plurality opinion). We therefore do not consider the Fifteenth Amendment claim separately.

At the outset of our consideration of the equal protection claim, we note one puzzling aspect of the plaintiffs' statement of that claim. They nowhere identify themselves as members of a different race than that of the black voters in whose behalf the challenged congressional districts allegedly (and concededly) were created. Nor, following this, do they plainly allege constitutional injury specific to their rights as members of a particular racial classification of voters. Indeed, in describing the constitutional injury allegedly caused by the race-conscious redistricting plan, they assert that it is injury suffered alike by "plaintiffs and all other citizens and registered voters of North Carolina—whether black, white, native American, or others." Complaint ¶ 29, at 12; *id.* ¶ 32, at 13. And in specifically alleging the equal protection injury, plaintiffs assert that it falls on "plaintiffs and all other voters." *Id.* ¶ 35, at 14. Only in alleging the Fifteenth Amendment injury do they seem to confine its impact to members "of the race or color of the plaintiffs." *Id.* ¶ 36, at 14.

We could, of course, interpret this as a deliberate (and humanly, if not legally, laudable) refusal to inject their own race[s] into a claim whose essence is to deplore race-consciousness in voting-rights matters. But we are reluctant to make that assumption in view of its implications for the case in its present posture. Constitutional injury to "all voters" of a state cannot of course constitute invidious racial discrimination against some voters only, hence a denial of equal voting rights protection, and such

a claim would therefore be self-defeating at the threshold. While we may be doing plaintiffs' intentions (if not their legal cause) a disservice, we therefore believe it appropriate to assume that the critical allegation here is that which (implicitly at least) rests plaintiffs' Fifteenth Amendment claim on their identities as white voters (a fact of which we take judicial notice).

Construed as a challenge by white voters to the state's redistricting plan on the basis that it violates their equal protection (and parallel Fifteenth Amendment) rights by virtue of its race-conscious creation of two black-majority congressional districts, the complaint fails to state a legally cognizable claim. As indicated, the challenge is made on alternative grounds: that any race-conscious redistricting is *per se* unconstitutional, and that to the extent the Voting Rights Act authorizes it, the Act is facially unconstitutional, or that, alternatively, the specifically challenged redistricting plan here involves an unconstitutional application of the Voting Rights Act because it fails to observe requirements of compactness, contiguity, and communities of interest, and was driven only by concerns to assure proportional representation of black citizens in North Carolina's congressional delegation. We take these in order, noting at the outset that the fact of "race-consciousness" in the legislative creation of the two black-majority congressional districts is established for purposes of decision in this case. Not only is the plaintiffs' allegation to that effect entitled to acceptance as a procedural matter, the state defendants formally concede that the state legislature deliberately created the two districts in a way to assure black-voter majorities and thereby comply with requirements of the Voting Rights Act. Dismissal Memorandum at 12.

(1)

The broad claim of *per se* unconstitutionality solely because of the form of race-consciousness in redistricting at

issue here is flatly foreclosed by Supreme Court precedent. Most directly in point, *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977) (hereafter *UJO*), still stands as direct rejection of the contention, at least where, as here, a state legislature's racially conscious purpose is to meet the broad remedial requirements of the Voting Rights Act. In dismissing a Fourteenth and Fifteenth Amendment vote-dilution challenge by white voters to the New York legislature's deliberate creation of a number of black-majority state legislative districts, Justice White, for a four-Justice plurality, specifically noted that "compliance with the [Voting Rights] Act in reapportionment cases [will] often necessitate the use of racial considerations in drawing district lines." *Id.* at 159. Thus, the plurality added,

> the Constitution does not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [the Voting Rights Act].

Id. at 161.[8]

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[8] Seven of the eight Justices deciding the case (including five of the present members of the Court) joined either expressly or by necessary implication in rejecting the unconstitutional *per se* contention. *See id.* at 155-62 (opinion of White, J., joined by Brennan, Blackmun and Stevens, J.J.); *id.* at 165-68 (opinion of White, J., joined by Rehnquist and Stevens, J.J.); *id.* at 179 (opinion of Stewart, J., joined by Powell, J.). Four expressly accepted the argument that constitutionality was established by the state's purpose of compliance with Voting Act requirements. *Id.* at 164-65 (opinion of White, J., joined by Brennan, Blackmun and Stevens, J.J.). Four thought constitutionality established, without regard to the Voting Rights Act, by the complaint's failure to allege, as an essential element of the white voters' constitutional vote-dilution claim, either a discriminatory purpose in or effect from the challenged redistricting. *See id.* at 165 (opinion of White, J., joined by Rehnquist and Stevens, J.J.) ("no fencing out of the white population from participation in the political process"); *id.* at 179-80 (opinion of Stewart, J., joined by Powell, J.) (no showing "that the legislative reapportionment had either the purpose or effect of discriminating

Plaintiffs offer no valid basis for our disregarding *UJO*'s rejection of their "unconstitutional *per se*" challenge to the Plan. They address *UJO*'s facially apparent *stare decisis* effect only by suggesting that in light of four later Supreme Court decisions and the fact that "there was no majority opinion," they "doubt that even the court's judgment would be the same today as it was fifteen years ago." Response at 21. The four later Supreme Court decisions relied on, *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S. Ct. 2997 (1990); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); and *Freeman v. Pitts*, ___ U.S. , 60 U.S.L.W. 4286 (U.S. Mar. 31, 1992) (No. 89-1290) are said to reveal such a new commitment by the Supreme Court to the "color-blind constitution" concept, that they have effectively undercut *UJO*'s authority. Response at 12-21. This surely is permissible advocacy, but as surely is not an acceptable basis for judicially disregarding *UJO*'s continued authority. Indeed, we see in these decisions no such intimation of a new constitutional perspective on the *UJO* voting rights issue as plaintiffs claim to see. None dealt directly with that voting rights issue. *Powers* dealt with the constitutionality of racially-motivated juror challenges; *Metro Broadcasting*, with racial set-asides of federal broadcast licenses; *Croson*, with a racial set-aside program for municipal public contracts; and *Freeman*, with state school desegregation decisions. All, it is fair to say, revealed varying degrees of concern about the inherent dangers of all race-conscious remedial measures—a concern undoubtedly shared by all thoughtful citizens who have pondered the matter. But none can be interpreted to reflect either a general rejection of all such measures as now seen to be *per se* unconstitutional, nor, even more surely, as a rejection of race-conscious redistricting by states act-

against [the white plaintiffs] on the basis of their race"; Voting Rights Act purpose only relevant as negating "invidious purpose of discriminating against white voters").

ing under the mandate of the Voting Rights Act. Indeed, one of the decisions expressly indicates continued acceptance of *UJO*'s authority on the specific voting rights issue. In *Metro Broadcasting*, decided in 1990, the Court, citing *UJO*, said that "a state subject to § 5 . . . may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with Section 5.' " 497 U.S. at ___, 110 S. Ct. at 3019. And in *Croson*, decided in 1989, a majority of the Justices expressly reaffirmed the constitutionality of a federal racial set-aside program similar to the municipal one held to be unconstitutionally based. 488 U.S. at 490 (O'Connor, J.); *id.* at 521-23 (Scalia, J., concurring in the judgment); *id.* at 557-58 (Marshall, J., dissenting).

We therefore conclude that *UJO* still stands as authority for rejection of plaintiffs' "unconstitutional *per se*" challenge to the Plan.

(2)

Turning to the as-applied challenge, we find it equally lacking in merit. To recapitulate, the contention is that if not *per se* unconstitutional because of its conceded race-conscious purpose, the specific action here challenged—the creation of two racially gerrymandered congressional districts—is unconstitutional because it was undertaken solely to ensure proportional representation for black citizens in the state's congressional delegation, and without observing any considerations of geographical compactness and contiguity and of communities of interest among district residents.

By this, plaintiffs seem to be asserting that to the extent any race-conscious redistricting is justified by the requirements of the Voting Rights Act, no more is justified than

is *required* by the Act.[9] That is to say, the constitutional limits of a state's remedial powers deliberately to create black—(or other minority)—majority districts is determined by the extent to which minority voters could prove entitlement to such districts under the Constitution or the Voting Rights Act. Here, the contention apparently is that black voters could not have established entitlement to the two challenged districts because of their "grotesque" noncompactness (their obviously gerrymandered configurations), hence the legislature acted unconstitutionally in creating them for the avowed purpose of complying with the Voting Rights Act (or the Attorney General's apparent interpretation of the Act's requirements).

If required to rest decision upon this contention, we might be disposed to reject its basic premise. *See McGhee v. Granville County*, 860 F.2d 110, 120 (4th Cir. 1988) (legislative remedial powers not limited by extent of provable Section 2 right); *see also UJO*, 430 U.S. at 165 (plurality opinion) (remedial action by legislature not dependent for constitutionality upon authority of or compliance with Voting Rights Act); *id.* at 1806 n.* (Stewart, J., concurring) (same). We choose, however, to rest decision on another, plainer, basis.

Simply put, just as in *UJO*, the plaintiffs here have not alleged—nor could they prove under the circumstances properly before us on this record—an essential element of their equal protection (and parallel Fifteenth Amendment) claim: that the redistricting plan was adopted with the purpose and effect of discriminating against white voters

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[9] This seems indicated by the plaintiffs' invocation of Section 2's "no-proportional-representation" disclaimer, and the "compactness"precondition found implicit in the statutory right by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 & nn. 16-17 (1986), and by the plaintiffs' reliance on Judge Eisele's recent exhaustive opinion rejecting *black voters'* challenge to a state congressional redistricting plan in *Turner v. Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991).

such as plaintiffs on account of their race. *See UJO*, 430 U.S. at 165-68 (plurality opinion); *id.* at 179-80 (Stewart, J., concurring). The requisite intent, for equal protection and Fifteenth Amendment purposes, is a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters—on a statewide basis—to participate in the political process and to elect candidates of their choice. *See id.* While it is sadly the case in contemporary society that such an intent might be judicially inferred were the state legislature controlled by a black majority, *cf. Croson*, 488 U.S. at 495-96 (opinion of O'Connor, J.), that, as a matter of judicial notice, obviously is not the fact here.

Plaintiffs seem to contend that it is enough to allege and prove an intent to favor black voters—that this necessarily involves an opposing intent to disfavor white voters in the required constitutional sense. But this of course is not the constitutional equation, nor the meaning of "invidious" discrimination in equal protection jurisprudence. The one intent may exist without the other. *See UJO*, 430 U.S. at 165 (plurality opinion). And by plaintiffs' own version of the legislative intent here—to comply with the Voting Rights Act—the necessary invidious intent to harm them in the constitutional sense as white voters simply is not possible to prove. *See id.* at 180 (Stewart, J., concurring).

Neither have they alleged, nor could plaintiffs prove, the requisite unconstitutional effect under the facts indisputably before us on this motion. That is to say, they cannot establish that creation of the two "grotesque" black-majority districts—however offensive it may be to their general notions of good constitutional government—has operated to "fenc[e] out the white population of the [state, or either of the two challenged districts] from participation in the political processes of the [state or districts], [nor to] minimize or unfairly cancel out white voting strength." *Id.* at 165 (plurality opinion). The plan demonstrably will

not lead to proportional underrepresentation of white voters on a statewide basis. *See id.* at 166 (plurality opinion). Within the specifically challenged districts (in only one of which do any of the plaintiffs, and then only two of the five, reside), the mere fact that white voters (assuming the sad continuation for yet another season of racial bloc voting) will elect fewer candidates of their choice than if they were in white-majority districts is not a cognizable constitutional abridgement of their right to vote, and the two plaintiffs who alone are registered to vote in one of the challenged districts, the Twelfth, will suffer no cognizable constitutional injury if her or his particular candidate should lose by virtue of the district's racial composition. *See id.*; *see also Davis v. Bandemer*, 478 U.S. 109,129-34 (1986) (comparable analysis of political gerrymandering claim). We therefore conclude that the plaintiffs' complaint fails to state a claim upon which relief can be granted under the Equal Protection Clause or the Fifteenth Amendment.

V

In this "racial gerrymandering" case, plaintiffs have raised a number of questions about the political and social wisdom of the North Carolina congressional redistricting plan's creation of two tortuously configured black-majority districts. The questions they have raised, however, are in the end political ones. Though legally justiciable, none of their specific claims of constitutional violation has merit. The constitutional provisions invoked either do not secure the specific individual voting rights asserted for them, or in the case of the traditional "vote-dilution" sources—the Fourteenth and Fifteenth Amendments—fail for want of facts from which the requisite discriminatory purpose and effect required to establish violation could be found.

This does not mean that a "reverse discrimination" vote-dilution case may never lie against any state redistricting plan, whether undertaken to ensure compliance with the

Voting Rights Act, or independently of that Act's compulsions. It only means that plaintiffs asserting such a claim must establish the requisite discriminatory purpose and effect upon them as individuals or a cognizable group that is required by constitutional voting rights jurisprudence.

Because the complaint fails to state a claim for relief under any of the constitutional provisions invoked, this action is subject to dismissal on the merits, and it has been so ordered.

/s/ J. Dickson Phillips, Jr.
J. Dickson Phillips, Jr.
United States Circuit Judge

/s/ W. Earl Britt
W. Earl Britt
United States District Judge

/s/ Richard L. Voorhees
Richard L. Voorhees
Chief, U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

RUTH O. SHAW, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
vs.	)	92-202-CIV-5-BR
	)	(THREE-JUDGE
WILLIAM BARR, et al,	)	DISTRICT COURT)
_____	)	

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Before PHILLIPS, Circit Judge, BRITT, District Judge, and VOORHEES, District Judge

DISSENTING OPINION

VOORHEES, CHIEF DISTRICT COURT JUDGE, concurring in part, and dissenting in part.

I concur in Parts I, II, III(A), IV(A), IV(B), and IV(C)(1) of the majority opinion. However, I feel compelled to register my disagreement with its other portions.

I

Because this Court lacks subject matter jurisdiction as to Defendants Barr and Dunne (the "Federal Defendants"), see ante, at Part III(A), I find it inappropriate for the majority to consider, as it did ante in Part III(B), the merits of the Federal Defendants' "discretionary power" defense under Morris v. Gressette, 432 U.S. 491 (1977), and to grant an alternative dismissal under Fed. R. Civ. P. 12(b)(6). "A dismissal under both rule 12(b)(1) and 12(b)(6) has a

'fatal inconsistency' and cannot stand." Ehm v. National R.R. Passenger Corp., 732 F.2d 1250, 1257 (5th Cir.), cert. denied, 469 U.S. 982 (1984) (quoting Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658, 667 (5th Cir. 1971)). Once a district court has refused to assert jurisdiction over any controversy, consideration of the merits of the cause of action or whether relief may be properly granted thereunder is beyond the scope of the court's authority. See, e.g., Rhodes v. United States, 760 F.2d 1180, 1186 (11th Cir. 1985); Local 1498, Am. Fed'n of Gov't Employees v. American Fed'n of Gov't Employees, 522 F.2d 486, 492 (3rd Cir. 1975). I would prefer the Rule 12(b)(1) dismissal of the Federal Defendants described in Part III(A) ante, due to the jurisdictional limitations set forth in the Voting Rights Act, 42 U.S.C.

§ 1973l(b), without any discussion of substantive defenses or Rule 12(b)(6). Reich v. Larson, 695 F.2d 1147 (9th Cir.), cert. denied, 461 U.S. 915 (1983); O'Keefe v. New York City Bd. of Elections, 246 F. Supp. 978 (S.D.N.Y. 1965); McCann v. Paris, 244 F. Supp. 870 (W.D. Va. 1965). I therefore dissent from Part III(B) of the majority opinion.

II

The paramount discord that I must register in opposition to the majority opinion lies in the Rule 12(b)(6) dismissal of this action as to Defendants Martin, Gardner, Blue, Edmisten, Ellis, Allen, Marsh, Turner, Youngblood, and the North Carolina State Board of Elections (the "State Defendants"). I concur generally as to the majority's characterization of Plaintiffs' claims

against the State Defendants and its consideration of said claims under Article I, Sections 2 and 4 of the Constitution, see ante, at Parts IV(A) and (B), and as to the majority's reliance on the continued binding precedential effect of United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) ["U.J.O."], in rejecting the attack on the Voting Rights Act as unconstitutional per se, see ante, at Part IV(C)(1). However, I disagree with the majority's adherence to an interpretation of U.J.O., as advanced by the State Defendants, that would give the North Carolina legislature unbridled discretion to implement race-conscious reapportionment plans. See ante, at Part IV(C)(2). The majority would characterize such unchecked discretion as being, in the end, "political," and therefore beyond the reach of this Court in the circumstances

presented by this case. See ante, at Part V, at 29.

That de facto interpretation, given the egregious form the purported implementation of the Voting Rights Act takes here (and which form we are required to assume exists here, taking the amended complaint in the light most favorable to Plaintiffs), is not ameliorated by the disclaimer lodged ante at Part V. By that section, the majority would leave the door ajar to theoretical future reverse discrimination plaintiffs to attack a state redistricting plan, albeit on unspecified grounds. This is difficult to square with the majority's finding elsewhere that so long as the state legislative intent is to comply with the Voting Rights Act, "the necessary invidious intent to harm [plaintiffs] in the constitutional sense as white voters

simply is not possible to prove." Id. at pp. 27-28. Plaintiffs are faulted for failing to bring forth evidence of invidious discrimination against them while they are summarily pre-empted from doing so, even by the most rudimentary processes of discovery.

It is well established that a federal court should deny a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasis added). See also Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); I R Constr. Prods. Co. v. D. R. Allen & Son, Inc., 737 F. Supp. 895, 896 (W.D.N.C. 1990). Because such dismissal is generally disfavored by the courts, see,

e.g., Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1471 (4th Cir. 1991) (citing 2A Moore's Federal Practice, para. 12.07 [2.-5], p. 12-63), a Rule 12(b)(6) motion should be granted sparingly and with great caution.[1] See, e.g., Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989); Huelsman v. Civic Center Corp., 873 F.2d 1171, 1174 (8th Cir. 1989); Mize v. Harvey Shapiro Enters., Inc., 714 F. Supp. 220, 225 (N.D. Miss. 1989). Rule 12(b)(6) does not permit dismissal on the judge's disbelief of the complaint's factual allegations, see, e.g., Neitzke v. Williams, 490 U.S. 319, 327 (1989); Fusco v. Xerox Corp., 676 F.2d 332, 336 (8th

[1]In fact, "[a]s a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co., 699 F. Supp. 1158, 1161 (E.D.N.C. 1988).

Cir. 1982), or the difficulty of proof facing the plaintiff, see, e.g., Haynesworth v. Miller, 820 F.2d 1245, 1254 n.73 (D.C. Cir. 1987); Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir. 1979), or the complaint's vagueness or lack of detail, see, e.g., Strauss v. Chicago, 760 F.2d 765, 767 (7th Cir. 1985), or the apparent unlikelihood that the plaintiff could succeed on the merits. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Revene v. Charles County Comm'rs, 882 F.2d 870, 872-74 (4th Cir. 1989). Instead, the appropriate inquiry is "whether the claimant is entitled to offer evidence to support the claims." Scheuer, 416 U.S. at 236. Any doubts should be resolved in favor of discovery and a subsequent trial. See, e.g., Revene, 882 F.2d at 873-74; Action Repair, Inc. v. American Broadcasting Co., 776 F.2d 143, 149 (7th

Cir. 1985); Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 457 n.5 (4th Cir. 1983); Williams v. Gorton, 529 F.2d 668, 672 (9th Cir. 1976), aff'd without opinion, 566 F.2d 1186 (9th Cir. 1977). Similarly, in the resolution of a Rule 12(b)(6) motion, the non-moving party has the benefit of all reasonable inferences and the presumed accuracy of all factual allegations contained in the complaint. See, e.g., Zinermon v. Burch, 494 U.S. 113, 118 (1990); Scheuer, 416 U.S. at 236; Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); A. S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529, 1530 (E.D.N.C. 1990); 2A Moore's Federal Practice, para. 12.07 [2.-5], p. 12-63.

A

The majority opinion in the case at bar has overstated the premise set forth by the U.J.O. plurality. While U.J.O. establishes race as one factor that may be considered in reapportionment, see U.J.O., 430 U.S. at 159 (plurality opinion); ante, at Part IV(C)(1), it is not the sole and self-sufficient constitutional criterion. In announcing the plurality's decision, Justice White stated:

> we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be the majority.

U.J.O., 430 U.S. at 168 (plurality opinion) (emphasis added). In other

words, while a State may engage in "deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [the Voting Rights Act]," id. at 161, the State is still obligated to apply traditional and constitutionally-espoused redistricting principles. The districts in question in this case are, in the word of the majority opinion, "tortured." Ante, at 5. The State Defendants' proffered interpretation of U.J.O., countenanced by the majority, has resulted in a First District map which looks like a Rorschach ink-blot test and in a serpentine Twelfth District that slinks down the Interstate Highway 85 corridor until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters.

Plaintiffs' amended complaint explicitly alleges that the State Defendants' creation of the First and Twelfth Districts was done "arbitrarily -- without contiguousness, geographical boundaries, or political subdivisions . . . ." **Amended Complaint at 1.** The State Defendants neither deny nor rebut this charge. Instead, they argue that, because their race-conscious reapportionment was enacted in the context of seeking approval under the Voting Rights Act, the new congressional districts must necessarily be considered to be the result of a legitimate, non-invidious discriminatory legislative purpose and are therefore constitutionally valid under U.J.O.. **State Defendants' Memorandum of Law in Support of Motion to Dismiss at 2, 16; State Defendants' Reply Brief in Support of Their Motion to Dismiss at 2.** The

majority has apparently embraced this lex nemini operatur iniquum defense, notwithstanding its recognition that in U.J.O. only "[f]our [Justices] expressly accepted the argument that constitutionality was established by the state's purpose of compliance with Voting Act requirements." Ante, at 23 n.8 (citing U.J.O., 430 U.S. at 164-65 (plurality opinion)). See also ante, at 22, 27-28. Based upon my reading of the above-quoted passage of the U.J.O. plurality opinion, I disagree with the majority's inference that U.J.O. has created an absolute defense based on a state legislature's intended compliance with the Voting Rights Act. See infra Part II(C).

Disregard by the State Defendants of the "sound districting principles" (as espoused by Justice White, quoted above)

in the creation of the First and Twelfth Districts would puncture the U.J.O. shield as a justification for the race-conscious reapportionment in question. Time-honored, constitutional concepts of districting, such as contiguity, compactness, communities of interest, residential patterns, and population equality, have maintained their obligatory effect and precedential value as deterrents against equal protection encroachments by way of reapportionment based exclusively on racial criteria. See, e.g., U.J.O., 430 U.S. at 168 (plurality opinion).[2] It seems

[2]See also U.J.O., U.S. 430 at 172-73 (Brennan, J., concurring in part) (discussing the possibility that "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantages treatment of the plan's supposed beneficiaries"); Plessy v. Ferguson, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting) ("State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuation of which must do harm to all concerned.")

implausible that even the fiercest partisan of the Voting Rights Act would have imagined, at the time of its inception, that the Act gave carte blanche to white dominated state legislatures to draw districts virtually immune from judicial review, so long as the cry is raised: "We were only complying with the Voting Rights Act."

The majority correctly observes that mere allegation and proof of an intent to favor minority voters does not, by itself, establish the existence of invidious discrimination against majority race voters. See ante, at 27. However, Plaintiffs have shown much more in support of their cause. The Twelfth District careens for almost 160 miles, from the tobacco farms and warehouses of Durham County, through the furniture plants and

galleries of High Point, on into the banking and retail centers of Charlotte, ending in the textile mill country of Gastonia, and dissecting at least 12 counties in the process.[3] The very shape of the district belies any possible contention by the State Defendants that they employed "sound districting principles" in the implementation of their reapportionment plan. In fact, they make no pretense of such a contention. In our evaluation of the Rule 12(b)(6) motion, this disregard for "sound districting principles" must be combined with the fact that in order to favor a district traversing piedmont North Carolina, the General Assembly rebuffed 1) the

[3]There is a notable incongruity in the fact that, in creating two new federal congressional districts, the General Assembly wilfully truncated so many North Carolina counties, when the North Carolina Constitution forbids similar fragmented methods of districting for the reapportionment of State representatives. **N.C. Const. art. II, § 5(3) ("No county shall be divided in the formation of a representative district. . . .").**

"significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina . . . . [f]or the south-central to southeast area," ante, at 4-5 **(quoting Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991))**, and 2) the proposals of the Attorney General, the North Carolina Republican Party, and some number of nonpartisan groups. See id. at **4-5 and n.3.**

These facts augur a constitutionally suspect, and potentially unlawful, intent on the part of the State Defendants. Moreover, the majority assumes that, **because the North Carolina General Assembly is controlled by a white majority, the State Defendants could not**

have held an invidious discriminatory intent against Plaintiffs. Ante, at 27. I question the validity of such an assumption. The shift of the proposed minority-majority district from south-central or southeast North Carolina to the piedmont area of the State and the contorted shape of the Twelfth District could be indicative of a racial animus against eastern North Carolina black voters or piedmont North Carolina white voters. See Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990) (although redistricting done primarily to protect incumbents, the fragmentation of the Hispanic voting population as the avenue to achieve that goal caused the unlawful discriminatory effect). Given notice pleading, Plaintiffs should be allowed to demonstrate, if they can, the existence of impermissible intent.

B

I have other concerns about the dispositiveness of the U.J.O. plurality opinion in the instant case. First, the U.J.O. plurality, relying on the fact that the race-conscious reapportionment at issue was confined to the boundaries of Kings County, New York, rejected the Petitioners' claims of unfair representation because unaltered white majority districts still outnumbered the reapportioned nonwhite majority districts, thereby assuring, assuming voting along racial lines, a continued majority of white elected representatives in Kings County. U.J.O., 430 U.S. at 166 (plurality opinion). "The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts

in the rest of the county." Id. at 166 n.24 (emphasis added).

I do not believe that this mitigation at the county level is equally applicable on the more geographically diverse statewide level. If a voter in the coastal First District of eastern North Carolina, for whatever reason, feels his or her interests are best represented by a certain Representative, there is little chance that the voter will be placated by the suggestion that a Representative from the mountainous Eleventh District in western North Carolina shall adequately represent his or her interests.

> [Legislators] represent people, or, more accurately, a majority of the voters in their districts--people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of

> which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests.

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting). Over against any such mitigating effect on the statewide level is the greater likelihood that two voters of different races in a given geographically compact district will share the same interests and concerns and elect a mutually agreeable Representative, irrespective of race.

Second, the race-conscious reapportionment at issue in U.J.O. was implemented on the basis of nonwhite majorities, which the plurality defined as including blacks, Hispanics, and Asian Americans. U.J.O., 430 U.S. at 149-50 & n.5 (plurality opinion). Because the Attorney General's objection to the

initial redistricting in the instant case cited the General Assembly's failure to "give effect to black and Native-American voting strength in [south-central to southeast North Carolina]," ante, at 4 (quoting Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991) (emphasis added)), the merit of the State Defendants' motion to dismiss cannot be weighed solely on considerations of the black/white voting strength dichotomy. North Carolina's cultural diversity also encompasses Native Americans, including sizable populations of Cherokee Indians in western North Carolina and Lumbee Indians in southeastern North Carolina. To my knowledge, there is no "politically cohesive, geographically insular minority

group," Thornburg v. Gingles, 478 U.S. 30, 49 (1986), of Native Americans centered in piedmont North Carolina through which the Twelfth District snakes. Discovery in this area of facts might flesh out Plaintiffs' claims.

C

Furthermore, I believe the majority has discerned a lex nemini operatur iniquum defense in reapportionment cases from the U.J.O. plurality opinion that simply is not present in that opinion. See ante, at 23 n.8 (citing U.J.O., 430 U.S. at 164-65 (plurality opinion). In Part III of Justice White's opinion, joined by Justices Brennan, Blackmun, and Stevens, the plurality noted that "Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was

authorized by our constitutionally permissible construction of § 5." U.J.O., 430 U.S. at 164 (plurality opinion). The position taken by the Attorney General and acceded to by the New York legislature, as set forth in the preceding paragraph of the U.J.O. opinion and the factual summary presented by Justice White, concerned only the 65% nonwhite majority district size to be achieved by the new reapportionment plan. See id. at 152 ("A staff member of the [New York] legislative reapportionment committee testified . . . he 'got the feeling [from Justice Department officials] . . . that 65 percent would probably be an approved figure' . . . ."), 164 ("We think it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority--in the vicinity of 65%--would be required to achieve a nonwhite majority of

eligible voters.") (emphasis in original).

My reading of these passages suggests a more fact-specific inquiry on the issue of constitutionality, emphasizing the specific actions taken by a State legislature in response to the Attorney General's discretionary construction of § 5. Where the State's reapportionment plan simply codifies in toto the Attorney General's decisions on reapportionment, a presumption of constitutionality may be properly inferred from the legitimacy and deference accorded the Attorney General's performance of his statutory responsibilities.[4] Morris, 432 U.S. at

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[4] In light of the Supreme Court's recent decision in Presley v. Etowah County Comm'n, __ U.S. at __, 112 S. Ct. 820 (1992), I do not express any opinion as to the inviolateness of such a presumption. See Presley, __ U.S. at __, 112 S. Ct. at 831 ("Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.").

506 n.23 ("Congress--like the courts--operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities."). In U.J.O., the New York legislature expanded the size of the nonwhite majorities in the districts in question so as to satisfy the 65% floor suggested by the Attorney General. U.J.O., 430 U.S. at 151-52.

In my opinion, however, no presumption of constitutionality or lack of invidious discrimination should attach to a reapportionment plan where, as happened here, the State legislature disregarded the Attorney General's discretionary and, therefore judicially unassailable, prescriptions for reapportionment in North Carolina.

In the instant case, the North Carolina General Assembly did revise the

first redistricting plan, as required by the Attorney General. The State Defendants claim that "[t]he General Assembly chose to meet what it understood to be the Attorney General's objections . . . ." State Defendants' Memorandum of Law in Support of Motion to Dismiss at 2. However, as noted by the majority, see ante, at 4-5 & n.2, 3, the General Assembly ignored the proposals of the Attorney General and numerous partisan and nonpartisan groups by creating a second nonwhite majority district transecting piedmont North Carolina. In other words, the General Assembly intentionally disregarded the Attorney General's construction of § 5, as it applied to North Carolina's geographic minority concentrations and voting trends, in favor of its own predilections. While the Attorney General did not object to the

General Assembly's second reapportionment plan, see, e.g., Morris, 432 U.S. at 506-07 (Attorney General's preclearance does not preclude traditional constitutional challenges); Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987) (Attorney General's preclearance does not preclude challenges under the Voting Rights Act), aff'd, 932 F.2d 400 (5th Cir. 1991), the second plan did not codify in toto the Attorney General's reapportionment decision for North Carolina, and is ineligible for the Morris court's presumption of validity inferred from the Attorney General's pre-apportionment performance of his statutory responsibilities.

Moreover, "[t]here is no indication whatever that [the second plan] . . . was in any way related--much less necessary--to fulfilling the State's obligation under

the Voting Rights Act as defined in Beer," namely to avoid "'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" U.J.O., 430 U.S. at 183 (Burger, C.J., dissenting) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)). The legislative discretion exercised by the North Carolina General Assembly, in purposeful disregard of the Attorney General's recommendations to the contrary, cannot be presumptively constitutional or free from invidious discrimination, for it was invoked and implemented pursuant to an unknown legislative intent that can be ascertained fully only by the fruition of discovery and trial in the instant case.[5]

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[5]Insulation of a State legislature's exercise of power from federal judicial review "is not carried over when state power is used as an instrument for circumventing a federally protected right." Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

III

For the reasons enumerated supra, I am unable to find beyond doubt that these Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. In the instant case, the Voting Rights Act has been used to create minority-leveraged congressional districts so devoid of shape, both in absolute terms and in terms of traditional North Carolina districts, and so "uncouth" and "bizarre"[6] in configuration, as to invite ridicule. See, e.g., "Political Pornography - II," Wall St. J., Feb. 4, 1992, at A14 (describing North Carolina's new congressional district map as "political pornography" and "computer-generated pornography"); "Review & Outlook: Political Pornography," Wall St. J., Sept.

[6]Karcher v. Daggett, 462 U.S. 725, 762 (1983) (citing Gomillion, supra, and 40 Congressional Quarterly 1190 (1982)).

9, 1991, at A10 (same). To know this, one may simply inspect their computer-drafted labyrinthine convolutions superimposed upon a map of North Carolina. These districts are justified, according to the State Defendants, on grounds that the raw black/white numbers come out right, ending the inquiry. We are not presented for scrutiny, however, with facts including just what numbers were used, or why.

Moreover, it could hardly have been the intent of Congress to permit elevation of the racial criterion to the point of exclusion of all other factors of constitutional dimension, such as contiguity, compactness,[7] and communities of interest, which bear on the rights of

[7]"Without some requirement of compactness, the boundaries of a district may twist and wind their way across the map in fantastic fashion in order to absorb scattered pockets of partisan support.' " Karcher, 462 U.S. at 755-56 (quoting Reock, "Measuring Compactness as a Requirement of Legislative Apportionment," 5 Midwest J. Pol. Sci. 70, 71 (1961)). This observation applies equally well to allegations of racial gerrymandering.

these Plaintiffs. Certainly this Court should not ignore such factors, nor should it give the constitutional nod to the State Defendants' acts and motives such as they may be, in arriving at these strange contours, without development of the evidence and a full record.[8]

In view of the plain proscription of the fifteenth amendment that States shall not abridge the right to vote on the basis of race, it is not surprising that the court in South Carolina v. Katzenbach called the Voting Rights Act "an uncommon exercise of Congressional power," suggesting that it lies at the outer reaches of permissible law. South

[8]"The lack of evidence . . . is, of course, not surprising, since petitioners' case was dismissed at the pleading stage. If this kind of racial redistricting is to be upheld, however, it should, at the very least, be done on the basis of record facts, not suppositions. If the Court seriously considers the issue in doubt, I should think that a remand for further factual determinations would be the proper course of action." U.J.O., 430 U.S. at 183-84 (Burger, C.J., dissenting) (footnote omitted).

Carolina v. Katzenbach, 383 U.S. 301, 334 (1966). The demonstration by the Plaintiffs thus far shows that the instant case lies at the outer reaches of permissible facts under the law, at best. It demands, by virtue of the constitutional sensitivity of the issues, that the Plaintiffs be allowed to engage in discovery and elicit at least some evidence to allow this trial court to determine whether permissible limits have been breached.

Because Congress provided a mechanism for race-conscious reapportionment when it enacted the Voting Rights Act, but gave little guidance beyond the statement of purpose, it falls upon the courts to set forth constitutionally valid standards by which such reapportionment may be most effectively and equitably implemented. See, e.g., U.J.O., 430 U.S. at 172-73

(Brennan, J., concurring in part) ("Once it is established that circumstances exist where race may be taken into account in fashioning affirmative policies, we must identify those circumstances, and further, determine how substantial a reliance may be placed upon race.") (footnote omitted). It is not enough to leave these standards to the vicissitudes of "politics."

For the reasons enumerated above, I concur as to Parts I, II, III(A), IV(A), IV(B), and IV(C)(1) of the majority opinion and the Rule 12(b)(1) dismissal of the Federal Defendants. As to the remaining portions of Parts III and IV, Part V, and the Rule 12(b)(6) dismissals of the Federal and State Defendants, I respectfully dissent.

/s/ Richard L. Voorhees, Chief Judge

RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 92-202-CIV-5-BR

RUTH O. SHAW, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	O R D E R
	)	
WILLIAM BARR, et al.,	)	
	)	
Defendants.	)	

This action was instituted on 12 March 1992 challenging the constitutionality of the Congressional Redistricting Plan adopted by the General Assembly of North Carolina and precleared by the Attorney General of the United States pursuant to § 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973. As provided by law, a three-judge panel was appointed by the Chief Judge of the United States Court of Appeals for the Fourth Circuit to hear the case. 28 U.S.C. § 2284(a). Named as

defendants are William Barr, Attorney General of the United States, and John Dunne, Assistant Attorney General of the United States (the federal defendants); and James G. Martin, Governor of North Carolina, James Gardner, Lieutenant Governor of North Carolina, Daniel T. Blue, Jr., Speaker of the North Carolina House of Representatives, Rufus L. Edmisten, Secretary of State of North Carolina, the North Carolina State Board of Elections, and M.H. Hood Ellis, Chairman, and Gregg O. Allen, William A. Marsh, Jr., Ruth Turner, and June K. Youngblood, members of the North Carolina State Board of Elections (the state defendants).

The matter is before the court on motions by both the federal defendants and the state defendants to dismiss pursuant to the provisions of Rules 12(b)(1) and

12(b)(6) of the Federal Rules of Civil Procedure. A hearing was held this date in Raleigh, North Carolina.

Upon full consideration, it is the decision of the panel that both motions to dismiss be allowed. In accordance therewith, this order of dismissal is being entered this date with a written opinion to follow.

The motions to dismiss are ALLOWED and this action is hereby DISMISSED.

This 27 April 1992.

FOR THE COURT

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, AND DOROTHY G. BULLOCK Plaintiffs, v. WILLIAM BARR, in his official capacity as Attorney General of the United States; JOHN DUNNE, in his official capacity as Assistant Attorney General of the United States, in charge of the Civil Rights Division; JAMES G. MARTIN, in his official capacity as Governor of the State of North Carolina; JAMES GARDNER, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his his official capacity as Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an	NOTICE OF APPEAL

official agency of the State of North Carolina; M. H. HOOD ELLIS, in his official capacity as Chairman of the North Carolina State Board of Elections; GREG O. ALLEN, WILLAIM A. MARSH, JR., RUTH TURNER, and JUNE K. YOUNGBLOOD, in their official capacities as members of the North Carolina State Board of Elections, Defendants.	

NOW COME the plaintiffs through counsel and pursuant to Rule 18 of the Supreme Court Rules hereby give notice of appeal to the Supreme Court of the United States from the order and judgment of the three judge district court entered on April 27, 1992 dismissing the Complaint in this action.

This appeal is taken pursuant to Section 1253 of Title 28 of the United States Code.

This the 27th day of May, 1992.

/s/ Robinson O. Everett
Robinson O. Everett
N.C. State Bar #1385

pro se and as Attorney fo
the other Plaintiffs

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT AND DOROTHY G. BULLOCK,

Plaintiffs,

v.

WILLIAM BARR, in his official capacity as Attorney General of the United States;
JOHN DUNNE, in his official capacity as Assistant Attorney General of the United States, in charge of the Civil Rights Division;
JAMES G. MARTIN, in his official capacity as Governor of the State of North Carolina;
JAMES GARDNER, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate;
DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives;
RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina;
THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina;
M. H. HOOD ELLIS, in his offi-

COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION AND FOR TEMPORARY RESTRAINING ORDER

cial capacity as Chairman of the North Carolina State Board of Elections; GREGG O. ALLEN, WILLIAM A. MARSH, JR., RUTH TURNER, and JUNE K. YOUNGBLOOD, in their official capacities as members of the North Carolina State Board of Elections,

Defendants.

PRELIMINARY STATEMENT

This is an action challenging the constitutionality of coercive requirements imposed by the Defendants Barr and Dunne, acting in their official capacities under the purported authority of the Voters Registration Act of 1965, as amended, 42 U.S.C. Secs. 1973 et seq. ("Voting Rights Act") upon the remaining Defendants, (the "State Defendants") acting in their official capacities as State officers, in the performance of duties to formulate Congressional redistricting for North Caro-

lina to reflect the results of the 1990 census.

This action also challenges the constitutionality of the Congressional redistricting plan which the State Defendants have formulated and are implementing as a result of the coercive requirements imposed by Defendants Barr and Dunne and their subordinates. The Plaintiffs do not base their claim on the assertion that the redistricting plan is formulated to benefit any particular political party or incumbent. Instead their claim is grounded in the unconstitutional interpretation and application of the Voting Rights Act by Defendants Barr and Dunne, acting in their capacities as officers of the United States, and the coerced and enforced acceptance of that interpretation and application by the other Defendants, acting in their capacity

as officers of the State of North Carolina, which unconstitutional interpretation has injured and impaired important rights of the Plaintiffs as citizens, residents, and registered voters of the State of North Carolina and will continue to injure and impair those rights for many years to come.

With respect to the acts of Defendants Barr and Dunne, the rights infringed are those granted expressly or implicitly by Article I, Sec. 2 and 4 and Article 4, Sec. 2, Clause 1, of the United States Constitution, by the due process clause of the Fifth Amendment, and by the Fifteenth Amendment. With respect to the acts of the State Defendants, the rights infringed are those granted expressly or implicitly by Article I, Secs. 2 and 4, of the United States Constitution and by the Fourteenth and Fifteenth Amendments. Plaintiffs seek

a declaration that Defendants Barr and Dunne have acted unconstitutionally in coercing the State Defendants into adopting a Congressional redistricting plan in North Carolina which violates the Constitution; an injunction against further actions by Defendants Barr and Dunne to coerce the Defendants into adopting and implementing an unconstitutional plan of redistricting; a declaration that the redistricting plan for North Carolina adopted and implemented by the State Defendants for the 1992 Congressional elections is unconstitutional; and an injunction against the State Defendants from allowing a Congressional election to be conducted in 1992 under this redistricting plan.

JURISDICTION AND VENUE

1. This action arises under Article I, Secs. 2 and 4; Article IV, Sec. 2; and the

Fifth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and under 42 U.S.C. Secs. 1983 and 1988, and 2 U.S.C. Sec. 2.

2. This Court has original jurisdiction of this action pursuant to 28 U.S.C. Secs. 1331, 1343(3) and (4), 1361 and 2284.

3. Venue exists under 28 U.S.C. Sec. 1391(b) because the acts and events which are the subject of this action occurred principally in Raleigh, North Carolina in the Eastern District of North Carolina.

THREE-JUDGE DISTRICT COURT

4. Convocation of a three-judge district court is required by 28 U.S.C. Sec. 2284 because this action challenges the constitutionality of the statewide apportionment of congressional districts for the State of North Carolina.

PARTIES

5. All the plaintiffs are residents and citizens of Durham, North Carolina, and are registered to vote in that county. Prior to the 1992 Congressional redistricting, plaintiffs Shaw, Shimm, Robinson Everett and Bullock have been registered to vote in the Second District; but under the 1992 redistricting plan that has been adopted in North Carolina, plaintiffs Shaw and Shimm will vote in the Twelfth District but plaintiffs Robinson Everett and Bullock will continue to vote in the Second Congressional District. James M. Everett registered to vote after the 1992 redistricting plan had been adopted in North Carolina and currently is a registered voter in the second Congressional District.

6. Defendant William Barr is the Attorney General of the United States;

and, as head of the Department of Justice, is responsible for the enforcement of civil rights under federal law and the United States Constitution. He is sued in his official capacity. Defendant John Dunne is the Assistant Attorney General of the United States and, under the direction and supervision of Defendant Barr, is in charge of the Civil Rights Division of the Department of Justice and is directly responsible for the enforcement and protection of voting rights under the Voting Rights Act. He is also sued in his official capacity.

7. Defendant James G. Martin is the Governor in and for the State of North Carolina and, in such capacity, is the Chief Executive Officer of the State charged with the duty of enforcing compliance with state legislation under Article II, Sec. 5(4) of the Constitution

of North Carolina. Moreover, it is the Governor's duty to issue a commission to a person elected to the United States House of Representatives upon that person's production to the Governor of a certificate of his election from the Secretary of State, pursuant to N.C. Gen. Stat. Sec. 163-194. He is sued in his official capacity.

8. Defendant James Gardner is the Lieutenant Governor of North Carolina and, as part of his official duties, he presides over the North Carolina Senate and certifies certain actions of the Senate. He is sued in his official capacity.

9. Defendant Daniel T. Blue, Jr. is the Speaker of the North Carolina House of Representatives and, in this capacity, he presides over that body and certifies certain actions taken by the House of

Representatives. He is sued in his official capacity.

10. Defendant Rufus L. Edmisten, Secretary of State of North Carolina, is charged with preparing a certificate of election for each person elected after the Board of Elections certifies the result to him, pursuant to N.C. Gen. Stat. Secs. 163-193, and with recording the results of elections for the United States House of Representatives, pursuant to N.C. Gen. Stat. Secs. 163-195. He is sued in his official capacity.

11. The North Carolina State Board of Elections is an official agency of the State of North Carolina, which has been established to supervise and conduct elections in the State of North Carolina, including elections for the United States House of Representatives. Defendant M.H. Hood Ellis is the chairman and Gregg O.

Allen, William A. Marsh, Jr., Ruth Turner, and June K. Youngblood are members of the North Carolina State Board of Elections. All of these Defendants are charged with exercising the powers and duties of the State Board of Elections pursuant to N.C. Gen. Stat. Secs. 163-22. These Defendants are all sued in their official capacity.

1992 CONGRESSIONAL REDISTRICTING

12. Pursuant to the results of the 1980 decennial census, the State of North Carolina was entitled to only eleven members in the United States House of Representatives. Because of the substantial population increase recorded by the 1990 decennial census, North Carolina is now entitled to an additional member in the United States House of Representatives. Thus, the size of the State's Congressional delegation has increased

from eleven to twelve members pursuant to 2 U.S.C. Sec. 2.

13. The increase in the size of the State,s population and Congressional delegation required the State of North Carolina to redistrict the State's Congressional districts, so that each of the twelve Congressional Districts would have equality in population. To this end, on July 9, 1991, the General Assembly enacted redistricting legislation as Chapter 601 of the North Carolina Session Laws of 1991.

14. Because portions of the State of North Carolina are subject to the preclearance procedures of Section 5 of the Voting Rights Acts, the redistricting legislation could not take effect and was unenforceable unless and until the Attorney General of the United States failed to object to the redistricting plan within a

prescribed time after its submission to him.

15. Following its enactment, Chapter 601, the redistricting legislation, was duly submitted by the State of North Carolina to the Attorney General for preclearance pursuant to the Voting Rights Act.

16. On December 18, 1991, the Attorney General, acting through his subordinates in the United States Department of Justice, objected to this redistricting and refused preclearance. The basis for denying preclearance, as these Plaintiffs are informed, believe, and allege, was that the General Assembly had failed to create two Congressional Districts containing a majority of black persons and voters in order to better assure that in each district a black person would be elected to Congress; and plaintiffs further allege that by denying pre-

clearance on this basis defendants Barr and Dunne exceeded any authority they were entitled to exercise under any constitutionally proper interpretation of the Voting Rights Act. Thereby they attempted to coerce the General Assembly of North Carolina into enacting legislation that would violate the constitutional rights of the citizens, residents, and registered voters of North Carolina.

17. Because of the objection that had been made by the Defendant, Attorney General Barr, the General Assembly of North Carolina, in special session, enacted Chapter 7 (1991 Extra Session) (hereinafter "Chapter 7"), which provides for the redistricting of Congressional districts and an increase from eleven to twelve Congressional districts. Submitting to the requirements imposed by the Defendant Attorney General of the United

States, as reflected in the objection to the earlier redistricting legislation offered for preclearance, the General Assembly of North Carolina created two districts, each of which was designed and intended to contain a majority of black persons and black voters. By submitting to the requirements imposed by the defendants, Barr and Dunne, which requirements plaintiffs allege were neither authorized by the Voting Rights Act nor permitted by the United States Constitution, the General Assembly violated important rights possessed by the plaintiffs as citizens, residents and registered voters in the State of North Carolina.

18. The redistricting legislation, Chapter 7, was submitted to the Attorney General for preclearance. The Attorney General entered no objection to the new redistricting plan.

19. Subsequently, on February 28, 1992, an action was filed against State officials by various plaintiffs objecting to the redistricting plan on several grounds. (See Pope et al v. Blue et al, Civil Action No. 3:92CV71-P, United States District Court, Western District of North Carolina, Charlotte Division.) Those grounds are distinct from the basis for this action; and the present Plaintiffs in no way adopt or incorporate the contentions made by the Plaintiffs in that action. A restraining order was entered in that action whereunder the filing date for the United States House of Representatives was delayed; but plaintiffs are informed, believe and allege that on or about March 9, 1992 a three judge district court, convened under 28 U.S.C., Sec. 2284, dismissed that action and dissolved the restraining order.

FIRST CAUSE OF ACTION

20. Article I, Sec. 2 of the United States Constitution provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several States", Article 1, Sec. 4 provides that "times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing (sic) senators." Article 4, Sec. 2 states that, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states". The Fifth Amendment of the Constitution provides that no one shall "be deprived of life, liberty or property, without due process of law". The Fifteenth Amendment

states in Sec. 1 that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude".

21. The Plaintiffs are among the "people" of the State of North Carolina; and, therefore, having registered to vote in North Carolina, have rights under Article I, Sec. 2 of the U.S. Constitution, which are "liberties" protected by the due process clause of the Fifth Amendment.

22. One component of due process is equal protection; and equal protection is inconsistent with discrimination on the basis of race or color.

23. The interpretation, application and enforcement of the Voting Rights Act by Defendants Barr and Dunne has the

effect in North Carolina of isolating a large number of black persons into two Congressional Districts separate and apart from the "people" in the other ten Congressional Districts of the State. Such application or enforcement of the Voting Rights Act by these Defendants, as Plaintiffs are informed and believe, stems from the interpretation by these two Defendants that the Voting Rights Act requires the creation of districts containing a majority of minority persons ("minority districts") to assure the election of minority persons as members of Congress from those districts.

24. This interpretation by Defendants Barr and Dunne violates the language of 42 U.S.C. Sec. 1973(b) which provides "...that nothing in [section 1973] establishes a right to have members of a protected class elected in numbers equal

to their proportion in the population"; and therefore, it exceeds the authority granted to these defendants under the Voting Rights Act.

25. By interpreting and applying the Voting Rights Act as they did and then using their disapproval of the 1991 redistricting plan adopted by the General Assembly as a means to coerce the General Assembly of North Carolina into enacting a redistricting plan which would conform to their interpretation of the Voting Rights Act, Defendants Barr and Dunne interfered in a matter which under Article 1, Sec. 4, was reserved to the authority of the State of North Carolina and its General Assembly and as to which Congress never intended federal officials to interfere.

26. The interpretation of the Voting Rights Act by the Defendants Barr and Dunne and their enforcement of this

interpretation by their disapproval of the 1991 redistricting plan and their threat, express or implicit to disapprove any other redistricting plan which did not conform to their requirements tended to result in the creation of Congressional districts totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest.

27. By interpreting the Voting Rights Act to require the creation of "minority districts". which will insure the election of minority members of Congress, Defendants Barr and Dunne violated not only the statutory proviso of 42 U.S.C. Sec. 1973(b) but also the intent of Article I, Sec. 2 of the Constitution, which does not authorize or contemplate the creation of a system of proportional representation by race in the United States House of Repre-

sentatives, and the intent of Article 1, Sec. 4 of the Constitution, which by implication denies to Congress, or to persons reportedly acting pursuant to Federal Legislation, the authority to impose such a system upon the "people" of any state in their selection of members of the House of Representatives.

28. Acting on their erroneous interpretation of the Voting Rights Act and beyond any authority conferred on them by that Act, Defendants Barr and Dunne coerced the State of North Carolina into creating two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation of the State of North Carolina in the United States House of Representatives. By so doing, Defendants Barr and Dunne deprived the plaintiffs, who are citizens of North Carolina, of

"privileges and immunities of citizens in the several states", which include the privilege of voting in elections for the House of Representatives in districts which have not been drawn or created with respect to race, the privilege of choosing a representative without being limited in that choice by the decision of any government official that the person to be elected must be of a certain race, and an immunity from any action by the United States or its officers, agents or employees which shall impose racial quotas, either for voting districts or for the House of Representatives itself.

29. By their actions and their enforcement of an erroneous interpretation of the Voting Rights Act, defendants Barr and Dunne abridged the rights of the plaintiffs and all other citizens and registered voters of North Carolina

whether black, white, native American, or others -- to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters.

30. The unconstitutional creation of "minority districts" sought by Defendants Barr and Dunne, premised on their misinterpretation of the Voting Rights Act, is not a permissible remedy for any disparity that may have occurred in any time past between the percentage of members of any particular race who are citizens or registered voters of the State of North Carolina and the percentage of persons of that same race who are members of the House of Representatives from North Carolina.

31. Any registered voter in North Carolina, regardless of that person's race or color, has standing to object to this unconstitutional distortion of the electoral process along racial lines by officials acting under the purported authority of the United States, as Defendants Barr and Dunne have done.

SECOND CAUSE OF ACTION

32. The preceding allegations of this complaint are incorporated by reference and realleged.

33. The Plaintiffs, as citizens and residents of the State of North Carolina, are part of its "people"; and as registered voters in the State, they have, under Article I, Sec. 2 of the Constitution, a right to choose members of Congress. Under Article 1, Sec. 4, this right is subject to control by Congress only to a limited extent and not in the

manner in which Defendants Barr and Dunne interpreted the Voting Rights Act.

34. The right of the plaintiffs to vote for members of the House of Representatives is a right as to which the plaintiffs are entitled to "the equal protection of the laws", with respect to any action taken by the State of North Carolina. Moreover, this right to vote for members of the House of Representatives of the United States is a "privilege" of citizens of the United States within the meaning of the Fourteenth Amendment and is protected by that amendment from being abridged by the State of North Carolina. The right of the plaintiffs as citizens of the United States to vote for members of the House of Representatives is also protected by the Fifteenth Amendment against being "abridged" by the State of North Carolina

on account of the race or color of the plaintiffs.

35. Any action by officers of the State of North Carolina which discriminates on the basis of race or color violates this right to vote for members of Congress; denies the Plaintiffs and all other voters equal protection of the laws; and on account of race or color abridges their right to vote.

36. By submitting to the unconstitutional requirements imposed by Defendants Barr and Dunne, and acquiescing in the creation of Congressional Districts intended to concentrate voters of a particular race and to elect members of Congress of a particular race, the General Assembly of North Carolina became an unwilling, but necessary, participant in creating a racially discriminatory voting process for the election of members of

Congress from North Carolina; and Defendants Gardner and Blue, as part of their official duties, facilitated and implemented this action of the General Assembly. The remaining State Defendants, in various ways, as required, as part of their official duties, to join in executing the unconstitutional redistricting legislation adopted by the General Assembly in January 1992.

37. By their acts done in submission to the requirements imposed by Defendants Barr and Dunne, the State Defendants have heretofore violated, or, unless enjoined will in the immediate future inevitably violate, rights conferred upon these Plaintiffs by Article I, Sec. 2 and 4, and by the Fourteenth and Fifteenth Amendments of the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray that:

1. The United States District Court Judge to whom this case is initially assigned, immediately notify the Chief Judge for the United States Court of Appeals for the Fourth Circuit so that a three-judge Court may be convened to hear this case in as expeditious a manner as feasible.

2. The Court enjoin Defendants Barr and Dunne from imposing, directly or indirectly, any preclearance requirement that any Congressional District in the State of North Carolina have a majority population of persons of any particular race or color, and also that the Court enjoin Defendants Barr and Dunne from taking any action, whether under the Voting Rights Act, or otherwise, to establish, or to encourage or require establishment of, a redistricting plan whereunder persons of a particular race or

color -- whether black, white, native American, or otherwise - would be concentrated in a Congressional district that is in no way related to considerations of compactness, contiguousness and geographic or jurisdictional communities of interest.

3. The Court declare Chapter 7 to be unconstitutional and of no further force and effect as it purports to establish Congressional districts for the State of North Carolina.

4. That the Court direct the General Assembly to prepare a new redistricting plan for the State of North Carolina which will not concentrate in any Congressional district persons of a particular race or color whether black, white, native American, or otherwise -- in a manner that is totally unrelated to considerations of compactness, contiguousness, and geo-

graphic or jurisdictional communities of interest.

5. That upon the enactment by the General Assembly of new redistricting legislation, the new redistricting plan shall be submitted forthwith to the Defendant Attorney General for preclearance and that he shall act promptly to consider this plan without requiring, directly or indirectly, the concentration in a Congressional district of persons of a particular race or color -- whether black, white, native American, or otherwise -- in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest.

6. The Court permanently enjoin the defendants Ellis, Allen, Marsh, Turner and Youngblood from conducting elections for the U.S. House of Representatives in North

Carolina until the General Assembly enacts, and the Department of Justice preclears, a new redistricting plan as prayed for in paragraphs 4 and 5 above.

7. The Court enter both a temporary restraining order and preliminary injunction enjoining the defendants Ellis, Allen, Marsh, Turner and Youngblood from taking any action in preparation for primary or general elections for the U.S. House of Representatives in North Carolina until the General Assembly enacts and the Department of Justice preclears a new redistricting plan as prayed for in paragraphs 4 and 5 above.

8. That for purposes of consideration of any injunctive relief this complaint, when properly verified, be treated as an affidavit in this action.

9. That the Court award cost and attorneys fees to the plaintiffs as

against Defendants Barr and Dunne and against the United States pursuant to the Equal Access To Justice Act 28 U.S.C., Sec. 2412 or as otherwise authorized by law.

10. That the Court grant such other and further relief as may, to the Court, seem just and proper.

Respectfully submitted, this the 12th day of March, 1992.

/s/ Robinson O. Everett
Robinson O. Everett

N.C. State Bar #1385
Pro se and as Attorney for the Other Plaintiffs

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VERIFICATION

I hereby certify and swear that I have read the foregoing allegations of the complaint in this action and that, to the best of my knowledge, they are true.

/s/ Dorothy G. Bullock
Dorothy G. Bullock

Subscribed and sworn to
before me this 12th day of March, 1992.

Joyce M. Raby
Notary Public

My Commission Expires:

5/18/93

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 92-202-CIV-5-BR

RUTH O. SHAW, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	AMENDMENT
	)	TO COMPLAINT
WILLIAM BARR, et al.,	)	
	)	
Defendants.	)	

Pursuant to Federal Rule 15(a) of Civil Procedure, plaintiffs hereby amend their complaint as follows:

(1) In paragraph 27 line 10 of the complaint, substitute "purportedly" for "reportedly".

(2) After paragraph 36 of the complaint, add a new paragraph 36(A) of the complaint as follows:

36 (A)

"Although the General Assembly initially had been unwilling to create

districts that would conform to the requirements prescribed by Defendants Barr and Dunne, the decision by the General Assembly to create two Congressional Districts in which a majority of black voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions -- was a decision made with full awareness of the intended consequences and effects and was made with the purpose, shared with Defendants Barr and Dunne, to create Congressional Districts along racial lines and to assure that black members of Congress would be elected from two Congressional Districts in which a majority of black voters were intentionally and purposefully concentrated on the basis of census data reflecting the racial composition of North

Carolina's population. Plaintiffs allege that, for purposes of the Fourteenth and Fifteenth Amendments to the United States Constitution, this intent and purpose on the part of the members of the General Assembly of North Carolina was and is a racially discriminatory intent and purpose, regardless of their motive. Plaintiffs further allege that Chapter 7, the North Carolina redistricting legislation which creates bizarre, non-contiguous, and extraordinarily dispersed districts, such as the Twelfth District (see Exhibit A to the Complaint), and which was enacted as a result of the conscious decision by Members of the General Assembly and which decision the various State defendants are now seeking to implement -- is the result of an unconstitutional and racially discriminatory intent and purpose, which were

shared by the General Assembly and the State defendants with the Federal defendants. If this legislation is allowed to take effect, it will have the racially discriminatory effects and results intended by both the Federal and State defendants."

The prayer in the complaint is amended by adding thereto a paragraph 2(A), as follows:

"2(A). that, as authorized by 28 U.S.C. § 221, the Court declare that Defendants Barr and Dunne have misinterpreted and misapplied the intent and effect of the Voting Rights Act, and especially of 42 U.S.C. § 1973, and that this Act does not authorize or permit a State legislature to create Congressional Districts with the legislative intent or purpose of requiring any particular district to contain a majority of voters

of any particular race -- white, black, Asian, or Native American -- or with the intent or purpose that a specific District elect a member of Congress of a particular race; or, in the alternative, that the Court declare that, if the Voting Rights Act does permit or authorize a State legislature to create Congressional Districts with such an intent or purpose, as all the defendants have claimed, to that extent and in that regard the Voting Rights Act is unconstitutional."

In all other respects the allegations of the complaint are realleged and incorporated by reference.

This the 17th day of April, 1992.

/s/ Robinson O. Everett
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Pro se and as Attorney for the Other Plaintiffs

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CERTIFICATE OF SERVICE

I certify that I have served the foregoing amendment to the complaint and supporting memorandum of law on the Defendants by placing a copy thereof in the United States mail, postage prepaid, addressed as follows:

As to State Defendants

Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. Department of Justice
104 Fayetteville Street Mall
P.O. Box 629
Raleigh, N.C. 27692-0629

As to Federal Defendants

Margaret Person Currin
United States Attorney
310 New Bern Avenue
Suite 800 Federal Bldg.
Raleigh, N.C. 27601

and

Rebecca J. Wertz
Attorney, Voting Section
Civil Rights Division
Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

This the 17th day of April, 1992.

/s/ Robinson O. Everett
Robinson O. Everett

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, et al.,

Plaintiffs,

v.

WILLIAM BARR, et al.,

Defendants.

MEMORANDUM OF LAW

After filing of plaintiffs' complaint, the defendants filed motions to dismiss. The plaintiffs are now filing an amendment to their complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, which provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has been placed upon the trial calendar, the party may re-amend it at any time within 20 days after it is served.

. . .

The defendants have not yet answered the complaint. Both the federal and state defendants have filed motions to dismiss. A motion to dismiss is not a responsive pleading. *Smith v. Blackledge, 451 F.2d 1201, 1203, n.2 (4th Cir. 1971).* See also numerous cases collected under note 48 to Federal Rule 15 in U.S.C.A. Therefore, the filing of the amendment is a matter of right under the language of Rule 15(a).

This the 17th day of April, 1992.

/s/ Robinson O. Everett
Robinson O. Everett
N.C. State Bar #1385

Pro se and as Attorney for
the Other Plaintiffs

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